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## Supreme Court of the United States

**OCTOBER TERM, 1954**

## No. 145

CARLOS MARCELLO, PETITIONER,

*vs.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**PETITION FOR CERTIORARI FILED JUNE 17, 1954**

**CERTIORARI GRANTED OCTOBER 14, 1954**

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DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 854 Miscellaneous

UNITED STATES OF AMERICA EX REL
CARLOS MARCELLO

versus

EDWARD J. AHRENS, Officer in Charge,
United States Immigration and Naturalization Service.

APPEARANCES:

Wm. C. Orchard, Esq.,
Attorney for Petitioner

John N. McKay
United States Attorney

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 8th day of June, 1953, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including September 6, 1953.

# PETITION FOR WRIT OF HABEAS CORPUS

(Number and Title Omitted)

Filed: June 2, 1953

To the Honorable The Judges of the Unisted States District Court for The Eastern District of Louisiana:

The Petition of Carlos Marcello for a writ of habeas corpus respectfully shows:

I.

That your petitioner was arrested under a final order of deportation by the respondent herein on June 2, 1953, and is being unlawfully and illegally restrained of his liberty under color of authority of said order of deportation, as will hereinafter be shown.

II.

That petitioner was arrested on a warrant of arrest on December 30, 1952, which warrant charged that petitioner had violated the provisions of Section 1251(a) 11, Title 8, U. S. Code, in that the Immigration and Nationality Act of 1952 in that;

A. The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of law relating to the illicit traffic in narcotic drugs, to-wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

B. The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to-wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

That on February 16, 1953, a hearing was had before the Special Inquiry Officer of the Immigration and Naturalization Service who, after a hearing over the objection of your petitioner, entered on February 20, 1953 an order of deportation against your petitioner upon the following grounds:

1. That under Section 241(a) (11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to-wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th. Congress;

2. That under Section 241(a) (11) of the Immigration and Nationality Act of 1952, the petitioner is subject to deportation in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihaana, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th. Congress.

III.

That petitioner appealed said order of deportation to the Board of Immigration Appeals, which on June 2, 1953, affirmed the said order of deportation.

IV.

That petitioner entered the United States for permanent residence at New Orleans, Louisiana, on October 7, 1910, when he was eight months old, and has been continuously in the United States except for a one-hour visit to Mexico in 1937 or 1937; that petitioner is married to an American citizen and is the father of four children.

V.

That on October 29, 1938, petitioner was sentenced in this Court on his plea of guilty to a violation of the Marihuana Tax Act of 1937, in two counts, on which he received a general sentence of one year and one day which he served in the United States Penitentiary at Atlanta, Georgia.

VI.

That the final order of deportation is null and void and of no legal effect, and the restraint of petitioner under the color of such order of deportation is illegal and without warrant in law for the reasons hereinafter set forth.

VII.

That at the hearing before the Special Inquiry Officer

on February 16, 1953, petitioner objected to the entire proceeding on the ground that Section 1252(b), Title 8 of the United States Code, was unconstitutional, null and void as being violative of the due process clause of the Fifth Amendment of the Constitution of the United States, in that it did not meet the requirements or standards for fairness and impartiality required in a hearing, and further, that said section was violative of the Administrative Procedure Act (Title 5, U. S. Code, Sec. 1001 to 1011, particularly Sec. 1004(c) ).

VIII.

That it was held in the case of Wong Yang Sung v. McGrath, that deportation proceedings were subject to the Administrative Procedure Act; that after said decision a rider to the Appropriations Bill in 1950 exempted deportation hearings from the Administrative Procedure Act, but this rider was repealed by Section 403 (42) of the Immigration and Nationality Act of 1952, and such exemption no longer exists; that it was further held in the case of Kwong Haichew v. Colding, et al, 73rd. Supreme Court Reporter, 478, decided February 9, 1953, that "when the Constitution requires a hearing it requires a fair one before a tribunal which meets at least currently prevailing standards of impartiality."

IX.

Section 1252(b), Title 8, U. S. Code, provides that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The section further provides:

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall made determinations, including orders of deportation."

"No speical inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions *or in which he shall have participated (except as provided in this subsection in prosecuting functions.*"

The above quoted sections plainly show that investigative and prosecuting functions are combined with adjudicating functions in violation of the currently prevailing standards of fairness and impartiality.

X.

The section is further unconstitutional in that the special inquiry officer is subject to and responsible to the supervision and control of other officers, agents and employees of the service engaged in the performance of investigative and of prosecutive functions of the agency, and in fact is by the very terms of the act subject to the supervision of the highest enforcement officer in the United States, namely, the Attorney General, and this is plainly shown by Section 101, Paragraph 40 (4) of the Immigration and Nationality Act of 1952 defining a "special inquiry officer", which reads as follows:

"(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this act, as the Attorney General sahll prescribe."

XI.

The section of the law placing the inquiry officer under the supervision of the Attorney General is violative of the currently prevailing standards of fairness and impartiality in hearings, and is violative of the due process clause of the Fifth Amendment of the United States, and particularly in this case, where there has been injurious and prejudicial publicity to your petitioner, as will be shown by the record herein.

That on the day of the arrest of your petitioner the then Attorney General announced in a public statement both in Washington and in New Orleans that your petitioner was an undesirable citizen and had been guilty of many crimes, and that the proceedings were specially designed to deport petitioner.

That such publicity was bound to have great effect upon the special inquiry officer, and it must be remembered that these objections were made before any hearing and that the hearings were held subject to such objections.

XII.

That the petitioner is further informed and believes that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that your petitioner's name was included on this list.

XIII.

That Section 1251(a) (11), Title 8, U. S. Code reads as follows:

> "Any alien in the United States, shall, upon the order of the Attorney General be deported who (11) *at any time* has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation of *** marihuana ***."

And Paragraph (b) of the same section reads as follows:

> "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the cla[illegible]-

es enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occured prior to the date of enactment of this Act."

XIV

That both of said sections are violative of Article 1, Section 9, Clause 3 of the Constitution of the United States providing "no bill of attainder or ex post facto law shall be passed" (by Congress). An ex post facto law has been defined in the case of Burgess v. Salmon, 97 U.S. 331 (1878) as follows:

> "An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. Carpenter et al v. Commonwealth of Pennsylvania, 17 How. 456."

XV

That petitioner was convicted on October 29, 1938, of a violation of the Marihuana Tax Act of 1937 and sentenced to serve a year and a day in the Federal Penitentiary, served said sentence, and was discharged; that the penal provisions of said Marihuana Act provided for a fine or imprisonment or both; that at the time of the conviction of petitioner a violation of the Marihuana Act of 1937 was not included among the deportable offenses set out o in

JUDGMENT

(Number and Title Omitted)

Minute Entry

June 8th, 1953

Wright, J:

This cause came on at a former day to be heard on the application of the relator for a Writ of Habeas Corpus herein and was argued by counsel for the respective parties and submitted when the Court took time to consider;

Now on due consideration thereof and for the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the deportation order issued in this case is declared valid and the Writ of Habeas Corpus is hereby DISCHARGED.

IT IS FURTHER ORDERED BY THE COURT that the relator be released on $10,000.00 bail in the event an appeal is taken herein.

(Sgd.) J.S.W.

phases of the case. Nor does it appear that the special inquiry officer was controlled in any way by his superiors in the Bureau or in the Department of Justice in conducting the hearing or in reaching his decision.

Relator's contention that Section 241(a)11 of the Immigration and Nationality Act of 1952 is an unconstitutional ex post facto law is also without merit. It is true that Congress by passing Section 241(a)11 made a conviction "at any time" concerning marihuana ground for deportation. Thus the statute has retroactive effect. But the ex post facto clause of the Constitution applies only to criminal proceedings, *Calder* v. *Bull*, 3 U. S. 386, 390; *Johannessen* v. *United States*, 225 U. S. 227, 242, and deportation is not a criminal proceeding. *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Carlson* v. *Landon*, 342 U. S. 524, 537. The precise contention here made was rejected in *Mahler* v. *Eby*, 264 U. S. 32, and *Harisiades* v. *Shaughnessy*, 342 U. S. 580, is to the same effect.

The deportation order is valid. The writ of habeas corpus is discharged. In view of the fact that the government is not opposing relator's release on bail pending appeal, he may be released on $10,000 bail, in the event an appeal is taken from this ruling.

(Sgd.) J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana,
June 8th, 1953.

by or designated pursuant to statute."[6] And, to make the matter crystal clear, Section 242(b) states that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."[7]

The relator makes no contention that his deportation hearing did not conform to the requirements of Section 242 (b). His contention is the procedure outlined in Section 242(b) is violative of due process in that it is not in accord with the Administrative Procedure Act. His claim of improper procedure, however, would seem to be largely academic. He does not deny his conviction under the Marihuana Tax Act.[8] Since such conviction alone is the basis for his deportation, no amount of due process would help him.

In any event, his contention concerning lack of due process is not well founded. Section 242(b) meets the requirements of due process and the record of the hearing shows that the procedure provided in Section 242(b) was meticulously followed. Marcello was accorded every safeguard. He had notice of the charges and of the hearing; he was represented by counsel; he was allowed to cross-examine the Bureau's witnesses; he was allowed to present evidence in his own behalf. Further, there is no indication that the special inquiry officer conducting the hearing had previously participated in the investigative or prosecutive

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6 Section 7 (5 U.S.C. Sec. 1006 (a) ).

7 In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, the Supreme Court held that Congress intended the Administrative Procedure Act to apply to deportation proceedings. Since that decision Congress, by rider to an appropriation bill, excepted deportation and exclusion procedures from the Administrative Procedure Act. The Immigration and Nationality Act repealed the rider and substituted therefor the language quoted in the text of this opinion.

8 Nor could he. The conviction was before this court.

officer to present the evidence on behalf of the United States at the hearing but that such assignment shall not in any way diminish the authority conferred upon the special inquiry officer conducting the proceedings. It provides also that no special inquiry officer shall conduct a proceeding in any case in which he shall have theretofore participated in investigative or prosecutive functions. This section further provides that the alien shall be given reasonable notice of the nature of the charges against him and the time and place in which the proceedings shall be held; that the alien shall have the right to counsel; that the alien shall have reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, to cross-examine witnesses presented by the government, and that no decision of deportability shall be valid unless based upon reasonable, substantial, and probative evidence.

The procedure as outlined in Section 242(b) provides due process of law. In addition to the usual safeguards of due process, it guarantees the alien a fair hearing, one before an executive tribunal which meets currently prevailing standards of impartiality. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33,50. It is true that the procedure under Section 242(b) varies in some particulars from the procedure under the Administrative Procedure Act. But the Administrative Procedure Act alone is not the sole criterion of due process of law. The Constitution in providing for due process does not require a single procedure applicable in all cases. Nor has Congress adopted one. The Administrative Procedure Act itself provides that the procedure outlined therein does not apply to "the conduct of special classes of proceedings in whole or in part by or before boards or other officers specially provided for

On February 20, 1953 an order of deportation was issued by that officer. The deportation order was based on the grounds stated in the warrant of arrest. Marcello appealed to the Board of Immigration Appeals and on June 1, 1953 that board affirmed the decision of the special inquiry officer. His re-arrest followed on June 2nd.

Referring first to relator's claim of lack of due process, it is clear that an alien who is a lawful permanent resident of the United States is entitled to the protection of the Fifth Amendment. He may not be deprived of his right to remain in this country until his deportability is established by due process of law. *The Japanese Immigrant Case*, 189 U. S. 86, 100-101; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49-50; *Kwong Hai Chew v. Colding*, 344 U. S. 590, 598. With respect to deportation proceedings, due process of law means that the alien is entitled to notice of the nature of the charge against him and a hearing thereon at least before an executive or administrative tribunal. *The Japanese Immigrant Case*, supra; *Kwong Hai Chew* v. *Colding*, supra. And "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33,50.

Section 242(b) of the Immigration and Nationality Act provides that proceedings to determine deportability shall be conducted by a special inquiry officer who shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses and, as authorized by the Attorney General, make determinations including orders of deportation. It also provides that the Attorney General may assign an additional immigration

ality. He is now 43 years old and has resided in the United States since October 7, 1910. On October 29, 1938, he was sentenced to imprisonment for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. The first count charged that on or about December 6, 1937 he feloniously transferred to another individual a quantity of marihuana which transfer was not made pursuant to a written order on the required form in violation of the Marihuana Tax Act of 1937.[3] Count two charged a similar unlawful transfer of marihuana on or about December 19, 1937.

Marcello was first arrested by the Bureau of Immigration and Naturalization on December 30, 1952 under a warrant which charged a violation of Section 241(a)11[4] of the Immigration and Nationality Act of 1952 in that he was convicted of a violation of a law relating to the illicit traffic in narcotic drugs and in that he was convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana. After his release on bail, Marcello was given a hearing before a special inquiry officer pursuant to the provisions of Section 242(b)[5] of the Immigration and Nationality Act.

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3 26 U.S.C. Sec. 2591.

4 "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —

* * * * *

is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;" (8 U.S.C. Sec. 1251(a) 11).

5 8 U.S.C. Sec. 1252(b).

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# ORDER OF COURT DISCHARGING WRIT OF HABEAS CORPUS

(Number and Title Omitted)

Filed: June 8, 1953

William C. Orchard
Attorney for Petitioner

John N. McKay
United States Attorney
Attorney for Respondent

WRIGHT, District Judge:

This habeas corpus proceeding was brought to test the validity of an order of deportation issued pursuant to the provisions of the Immigration and Nationality Act of 1952.[1] Relator attacks the constitutionality of Section 242(b) of that act on the ground that the deportation procedure provided therein denied him due process of law in that it is contrary to the procedure prescribed in the Administrative Procedure Act.[2] Relator makes the additional contention that the conviction on which the order of deportation is based occurred in 1939 and such conviction was not made a basis for deportation until the Immigration and Nationality Act was passed in 1952.

Carlos Marcello, a native of Tunisia, is of Italian nation-

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[1] Habeas corpus is the proper remedy. *Heikkila* v. *Barber*, 345 U. S. 229.
[2] 5 USC Sec. 1001, *et seq*

REPORTER'S TRANSCRIPT

(Number and Title Omitted)

Filed: August 12, 1953

APPEARANCES:

John N. McKay, Jr., Esq., United States Attorney,
For United States of America.

William C. Orchard, Esq.,
Attorney for Carlos Marcello.

---

MR. ORCHARD:

Counsel for petitioner, Carlos Marcello, offers, introduces and files in evidence the entire record annexed to the return, and rests.

MR. McKAY:

The government rests.

(Argument).

THE COURT:

The record from the Board of Immigration Appeals has just been filed today, and the Court has not had chance to read and study it. Because of the nature of this case, the Court will render a decision in the matter later.

MINUTE ENTRY

June 5th, 1953

Wright, J:

(Number and Title Omitted)

This cause came on this day for hearing on petition for release from custody on writ of habeas corpus.

Present:

William C. Orchard,
Attorney for Petitioner;

John N. McKay,
United States Attorney;

Counsel for the petitioner offered various documents and rested.

Counsel for the United States also rested.

After hearing argument by counsel for the respective parties, the matter was submitted and the Court took time to consider.

ly found deportable under Section 241 of the Immigration and Nationality Act (8 USC 1251) on the following grounds:

(a) That he has been convicted of a violation of a law relating to the illicit traffic in narcotic drugs, and

(b) That he has been convicted of a violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana.

WHEREFORE, respondent prays that these proceedings be dismissed so that the order of deportation may be executed.

(Sgd.) JOHN N. McKAY
JOHN N. McKAY
United States Attorney
239 Post Office Building
New Orleans 12, Louisiana

1.

That the petitioner is an alien.

2.

That the respondent is the Officer in Charge of the New Orleans Office of the Immigration and Naturalization Service, Department of Justice, and has custody of the petitioner pursuant to an order of deportation issued by Fred P. McCleskey, Special Inquiry Officer of the Immigration and Naturalization Service, Department of Justice, which order of deportation was affirmed by the Board of Immigration Appeals of the Department of Justice on June 2, 1953.

3.

That the official record file No. A2669541 of the Immigration and Naturalization Service, Department of Justice, relating to the petitioner and containing the full record of his deportation proceeding is attached to this return and made a part hereof; that this Honorable Court is requested as a part of its order disposing of the present proceeding to direct the return of such official record to the respondent.

4.

That the deportation hearing of the petitioner was conducted in accordance with the constitution, laws and regulations of the United States, and that petitioner was proper-

ORDER

Let the writ of habeas corpus issue as prayed for, returnable before this Court on June 4th, 1953 at the hour of 2 O-clock P.M.

(Sgd.) J. SKELLY WRIGHT
JUDGE

New Orleans, Louisiana
June 2, 1953.

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RETURN TO WRIT OF HABEAS CORPUS

(Number and Title Omitted)

Filed: June 5, 1953

To the Honorable J. Skelly Wright, Judge of The United States District Court for The Eastern District of Louisiana:

Comes now the respondent in answer to the writ of habeas corpus issued by this Court on the 2nd day of June, 1953, and in accordance with Title 28 Section 2243 United States Code, certifies that the cause of the detention of the petitioner is as follows:

(Sgd.) WM. C. ORCHARD
WM. C. ORCHARD,
204 Queen & Crescent Building,
New Orleans 12, Louisiana.

ATTORNEY FOR PETITIONER.

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STATE OF LOUISIANA
PARISH OF ORLEANS

Personally came and appeared the undersigned authority Carlos Marcello who being duly sworn deposes and says;

That he is the petitioner named in the foregoing petition for Writ of Habeas Corpus.

That he has read the same and the facts and allegations contained therein are true and correct to the best of his knowledge, information and belief and that said petition is filed in good faith and that he believes that he is entitled to the redress therein sought.

(Sgd.) CARLOS MARCELLO
CARLOS MARCELLO

Sworn to and subscribed to
before me this 2nd day
of June, 1953.
(Sgd.) V. J. THIBERVILLE
Notary Public

reasons, his detention by the respondent herein under color of the authority of the final order of deportation, and the consequent restraint of his liberty is illegal, unlawful and without warrant in law, and that he should be released forthwith.

XXII.

That no previous application has been made to this or any other Court for the writ herein sought, or for similar relief.

XXIII.

That the original record is in the hands of the Board of Immigration Appeals, or the respondent herein, and petitioner calls for production of such records.

XXIV.

That said respondent is within the jurisdiction of this Court.

WHEREFORE, petitioner prays that the Writ of Habeas Corpus issue in terms of the law directed to the respondent requiring him to produce the body of the said Carlos Marcello on a time and place designated by said Court, and that upon a hearing thereof petitioner be discharged from said unlawful custody and restraint.

And for such other and further relief as may be necessary in the premises.

prohibiting the enactment of an ex post facto law.

XIX.

That the deportation order is based upon a finding that petitioner first violated a law relating to illicit traffic in narcotic drugs, and second, violated a law governing or controlling the taxing, etc. of marihuana; that petitioner was convicted upon two counts and was given a general sentence; that the finding of the special inquiry officer was illegal, null and void, and it was held in the case of Vautrot vs. United States, 8th. Circuit, 144 Fed. 2d. 41, that a general sentence does not presume that it is upon any particular counts, but is one sentence and one conviction.

XX.

Petitioner further shows that on March 3, 1953, petitioner made application for a suspension of deportation on the ground that more than ten years had elapsed since the commission of the act constituting ground for deportation, and that he had been a person of good moral character during that time, and that the case be reopened in order to allow petitioner to make such proof as was necessary for suspension, which suspension was denied on the ground that petitioner had refused to apply for such suspension at the hearing on February 16, 1953, and which action of the special inquiry officer was illegal, arbitrary and capricious.

XXI.

Petitioner further avers that for all of the above set forth

Section 156 (a), Title 8, U. S. Code; that on June 28, 1940, Congress amended said Section 156 (a) and added convictions on marihuana laws to the other deportable offenses; that further, section 22 of said Act of June 28, 1940, provided that no alien should be deported by reason of said amendment of 1940 on account of any act committed prior to June 28, 1940.

## XVI.

That consequently at the time of his conviction there was no law authorizing the deportation of petitioner and even after the admendment of June 28, 1940, petitioner was specifically exempt from the deportation provisions of said amendment and has thus enjoyed congressional immunity and pardon from deportation for a period of over twelve years.

## XVII.

That petitioner was caught completely unawares by the enactment of the Immigration and Nationality Act of 1952, and he was not adequately forewarned of the consequences of his prohibitive acts, and the effect of the enactment of these particular sections of the 1952 law is to provide a retroactive effect and add a penalty to the law under which petitioner was convicted.

## XVIII.

That therefore the said sections upon which the final order of deportation are based are violative of Article 1, Section 9, Clause 3 of the Constitution of the United States

## NOTICE OF APPEAL

(Number and Title Omitted)

Filed: June 8, 1953

Notice is hereby given that Carlos Marcello, petitioner herein, hereby appeals to the United States Court of appeals for the Fifth Circuit from the final judgment discharging a writ of habeas corpus, entered in this action on June 8th, 1953.

(Sgd.) WM. C. ORCHARD
WM. C. ORCHARD
204 Queen & Crescent Bldg.
New Orleans, 12, Louisiana
Attorney for Appellant.

---

## BAIL BOND PENDING APPEAL

(Number and Title Omitted)

Filed: June 9, 1953

Know All Men By These Presents:

That we Carlos Marcello as principal, and Carolina Casualty Insurance Co. as sureties, are held and firmly bound unto the United States of America _____

in the sum of Ten Thousand to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June, in the year of our Lord One Thousand Nine Hundred and fifty three.

WHEREAS, lately at the May TERM, A.D. 1953, of the District Court of the United States for the Eastern District of Louisiana, in a suit pending in said Court between the United States of America, plaintiff, and Carlos Marcello defendant, a judgment and sentence was rendered against the said Carlos Marcello, and the said Carlos Marcello has filed a notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said notice of appeal directed to the said United States of America, has been duly served.

Now, the condition of the above obligation is such, that if the said Carlos Marcello shall appear in the United States Circuit Court of Appeals for the Fifth Circuit at the City of New Orleans on the 9th day of June, A.D., 1953, and from day to day thereafter during said term, and from term to term thereof, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said

United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

(Sgd.) CARLOS MARCELLO (SEAL)
355 Huey P Long Ave-
Gretna, La.

CARCLINA CASUALTY
INS. CO. (SEAL)
(Sgd.) By ED. H. LITOLFF (SEAL)
Attorney in Fact
2741 Tulane Ave. Surety

Taken and acknowledged before me
on the day and year first above written.
(Sgd.) R. H. CARTER, JR.
United States Commissioner
Eastern District of Louisiana.
(SEAL)

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## MOTION & ORDER TO TRANSMIT EXHIBITS IN THEIR ORIGINAL FORM

(Number and Title Omitted)

Filed: July 27, 1953

Mover moves the Court for an order directing the Clerk to include in the record on appeal, in their original form, all exhibits filed in this case, which are essential to the con-

sideration of questions presented on appeal. Because of their voluminous nature it would be quite expensive to include them in the printed record.

(Sgd.) WM. C. ORCHARD
ATTORNEY FOR MOVER

ORDER

On motion of Mover-Appellant herein, IT IS ORDERED that all exhibits filed in this case be made part of the record and forwarded to the Court of Appeals in their original form.

New Orleans, La.
July 28, 1953

(Sgd.) HERBERT W. CHRISTENBERRY
JUDGE.

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DESIGNATION OF RECORD BY APPELLANT

(Number and Title Omitted)

Filed: August 13, 1953

Appellant, Carlos Marcello, through his counsel of record, Wm. C. Orchard Esq., hereby designates the following portions of the record to be included in the transcript of appeal:

1. Petition for Writ of Habes Corpus.
2. Order issuing Writ of Habeas Corpus.
3. Return of Respondent to Writ of Habeas Corpus.
4. Transcript of Hearing June 5, 1953.
5. Judgment of District Court, June 8, 1953, discharging writ of habeas corpus and fixing bail pending appeal.
6. Notice of Appeal.
7. Bail Bond.
8. Exhibit of Appellant and Respondent (to be transmitted in original).
9. This designation.

(Sgd.) WM. C. ORCHARD
WM. C. ORCHARD
204 Queen & Crescent Bldg.
New Orleans, 12, Louisiana
Attorney for Appellant,
Carlos Marcello.

## CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 30 pages to contain a true and correct copy of the record in the case entitled "United States of America Ex Rel Carlos Marcello -versus- Edward J. Ahrens, Officer in Charge, United States Immigration and Naturalization Service" No. 854 of the Miscellaneous Docket of this Court as made up in accordance with the Designation of Record copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, Louisiana, this 25th day of August, 1953.

A. DALLAM O'BRIEN, JR.,
Clerk

By (Sgd.) Andrew J. Bacon
Deputy Clerk

[fol. 32] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

CARLOS MARCELLO

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service

MINUTE ENTRY OF ARGUMENT AND SUBMISSION, DATED JANUARY 20TH, 1954, OMITTED IN PRINTING

[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14718

CARLOS MARCELLO, Appellant,

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION—Filed May 6, 1954

Before Borah and Russell, Circuit Judges, and Dawkins, District Judge

RUSSELL, Circuit Judge:

Carlos Marcello, a resident alien, was arrested and taken into custody by the United States Immigration Inspector at New Orleans, Louisiana, on December 30, 1952, under a warrant issued pursuant to section 242 [1] of the Immigration and Nationality Act of 1952.[2] The warrant charged specifically that Marcello was subject to be deported under

[1] 66 Stat. 208, 8 U. S. C. A. 1252(a).

[2] 66 Stat. 166, 8 U. S. C. A. 1101, et seq.

[fol. 34] section 241(a)(11) of the Act[3] for the reasons set forth in the margin.[4] Pending a hearing, which was three times continued, the alien was released under bond. The hearing was held at New Orleans on February 16, 1953, at which time the alien interposed objections to further proceedings on constitutional grounds. During the course of the hearing the special inquiry officer advised the alien, through his counsel, of his right to apply for a suspension of deportation,[5] which application must be made during the hearing, according to applicable regulations.[6] Counsel stated that the alien did not wish to apply for such relief. The decision and order of the special inquiry officer, rendered February 20th, held that Marcello was deportable for the reasons stated in the warrant and ordered that he be deported from the United States in the manner provided by law.

After rendition of the decision and order of deportation, the alien filed a motion to reopen the hearing to permit him to apply for discretionary relief by suspension of deportation. This motion was denied by the special inquiry officer on the ground that "the motion failed to state any new facts to be proved at the reopened hearing." In argument before the Board of Immigration Appeals the alien renewed [fol. 35] his claim of deprivation of constitutional process and in addition urged that his motion to reopen the hearing should be granted, "unless the Government is prepared to

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[3] 8 U. S. C. A. 1251(a)(11).

[4] "The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

"The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress."

[5] 8 U. S. C. A. 1254(a)(5).

[6] 8 C. F. R. 242.54(d).

waive that technical objection and permit the application for suspension to be considered by the Board."

The Board of Immigration Appeals overruled the alien's objections to the proceedings before the special inquiry officer and his attacks against the constitutionality of such proceedings, but accepted his proposal to consider his application for discretionary relief on the record made before the hearing officer It conceded arguendo that the alien could establish an "'exceptional and extremely unusual hardship' case" and his "good moral character" and that he would be able to establish all of the requirements essential to the invocation of its discretion,[7] but, for reasons[8]

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[7] Footnote 5, supra.

[8] "As against any evidence that he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana, (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, 'number one mobster in Louisiana,' etc.; and his refusal to testify before the Kefauver Committee.

"With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate sub-committee. He had refused to answer 166 questions on the ground that the answers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered. [Marcello v. United States, 5 Cir., 196 F. 2d 437]. In *Mahler v. Eby, supra*, [264 U. S. 32], at p. 42, the Supreme Court, in discussing the question of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated

[fol. 36] stated in its decision, the Board declined to grant such relief. The appeal was dismissed.

On June 2, 1953, the alien petitioned the district court for the writ of habeas corpus. The writ was issued and on June 5, 1953, a hearing was held at which time the alien offered in evidence the official record of the Immigration and Naturalization Service containing the full record of his deportation proceedings and rested without offering further evidence in support of the allegations of his petition. The district court, in an able memorandum opinion,[9] held the deportation order valid and accordingly entered judgment discharging the writ. From the order of dismissal Marcello has taken this appeal.

There is no question but that under section 241(a)(11), *supra*, Marcello is subject to deportation. He does not deny that in October, 1938, he was convicted, on his plea of guilty to an indictment containing two counts, of violating the [fol. 37] Marihuana Tax Act of 1937.[10] However, it is con-

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that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that 'the Attorney General *may, in his discretion*, suspend deportation * * *'. It is our considered opinion that the respondent's case is not one which merits the discretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal.''

[9] Reported at 113 Fed. Supp. 22.

[10] The appellant was given a general sentence of one year and one day imprisonment. He contends that since he was given a general sentence there was but one conviction, although the indictment related to two distinct transactions, therefore, the finding of the special inquiry officer that he was deportable on two grounds was unwarranted and prejudicial to him. He further submits that there is no valid law

tended that the district court erred in discharging the writ of habeas corpus on the ground that section 242(b), *supra*, is violative of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair and impartial hearing because: (1) investigative and prosecutive functions of the special inquiry officer are commingled with his adjudicative functions and (2) such officer is amenable to the supervision of the Attorney General whose responsibility it is to enforce the deportation statutes. He argues that sections 241(a)(11) and 241(d) of the Act, which authorize deportation for offenses committed prior to the effective date of the Act, are unconstitutional as *ex post facto* laws in that they imposed an additional punishment for an act greater than the law annexed to the crime when it was committed. Finally, he contends that he was entitled to a hearing on his application for discretionary relief which was denied him.

As we understand appellant's argument, he urges that the proceedings prescribed by section 242(b) are subject to, but not in conformity with, the Administrative Procedure Act,[11] or, if not subject to the requirements of that Act, then section 242(b) is violative of the Due Process Clause of the Fifth Amendment, since the Administrative Procedure Act establishes the "currently accepted standards of fairness and impartiality" necessary to constitute due process of law in administrative hearings. Clearly the procedure prescribed by section 242(b) does not accord with section 5(c)[12] [fol. 38] of the Administrative Procedure Act, and we shall consider first the contention that in all respects the requirements of the Administrative Procedure Act are controlling.

It is not necessary for decision in this case to consider the

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of the United States relating to "the illicit traffic in narcotic drugs", thus he could not have been, and was not, convicted of such an offense. Inasmuch as he was convicted of the "violation of [a] law or regulation governing or controlling the taxing", et cetera, of marihuana, which is a deportable offense under the statute, as charged in the warrant, admitted at the hearing and found by the hearing officer, we deem it unnecessary to this opinion to resolve these issues.

[11] 5 U. S. C. A. 1001, et seq.

[12] 5 U. S. C. A. 1004(c).

broad proposition of whether deportation proceedings are subject to requirements of the Administrative Procedure Act [13] as concerns matters not expressly provided by the Immigration Statute. Our investigation is limited to a determination of whether the proceedings provided for by section 242(b), which were followed in this case, are invalid because contrary to that Act. Prior to the enactment of the Immigration and Nationality Act of 1952, there was no express provision in the immigration law requiring that a hearing be granted a deportee. Such matters were left largely to be administered under regulations promulgated by the Attorney General. However, under the decisions of the Supreme Court,[14] the requirement for a fair hearing was necessarily implicit in the deportation statutes and such hearing was required to conform to the Administrative Procedure Act. Following the decision of the Supreme Court in the Sung case, Congress, by a rider to the supplemental appropriations bill enacted in September, 1950,[15] exempted "Proceedings under law relating to the exclusion or expulsion of aliens" from the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. This rider was [fol. 39] repealed by the Immigration and Nationality Act of 1952, which specifically prescribed the procedure to be followed in deportation cases in section 242(b) thereof with a further provision that:

> "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

Appellant relies upon the decision in the Sung case to support his contention that deportation proceedings are amenable to the requirements of the Administrative Procedure Act. However, at the time Sung was ordered deported Congress had prescribed no procedure to govern

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[13] See Sung v. McGrath, 339 U. S. 33; Rubinstein v. Brownell, D. C. Cir., 206 F. 2d 449, affirmed by an equally divided court, 346 U. S. 929.

[14] Notably The Japanese Immigrant case, 189 U. S. 86, 101, and Sung v. McGrath, supra.

[15] 64 Stat. 1048.

deportation proceedings. In the absence of such legislation the Supreme Court held that the hearing to which Sung was entitled under its prior decisions must conform to the Administrative Procedure Act. Since that time Congress has provided a "sole and exclusive" procedure for determining the deportability of an alien, and therefore, the Sung case is no longer applicable. The case of *Rubinstein v. Brownell*, footnote 13, *supra*, has no application here. It holds merely that a deportation order issued pursuant to the Immigration and Nationality Act of 1952 is subject to judicial review under section 10 of the Administrative Procedure Act.

In view of the plain language of the Immigration Statute, it is difficult to follow appellant's argument that the Administrative Procedure Act has the effect of nullifying the subsequent Act of Congress. He admits that section 242(b) [fol. 40] reveals "an unmistakable attempt by Congress to exempt immigration proceedings" from the Administrative Procedure Act, but contends that it has failed to do so. The force of appellant's argument is that by some means the Administrative Procedure Act has the standing of a Constitutional Amendment and Congress is powerless to provide for administrative hearings which do not conform to it. Of course, there is no validity to such an argument.

Section 7(a) of the Administrative Procedure Act, 5 U. S. C. A. 1006 (a), exempts from the purview of that Act "specified classes of proceedings . . . . . specially provided for by or designated pursuant to statute." We are persuaded that this exemption is applicable to hearings held under section 242(b). Furthermore, and controlling here, even in the absence of such provision, it was within the power of Congress to exempt such proceedings as those under review from the requirements of its creature, the Administrative Procedure Act. It is fundamental that a prior statute must yield to a subsequent valid act of Congress, insofar as the statutes are repugnant. We hold, therefore, that to the extent the proceedings prescribed by section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings.

It is beyond question that an alien has no absolute right to remain in the United States. Congress has plenary

[fol. 41] power over aliens and may deport them from this country at any time for any reason, even on grounds not existent at the time of their entry. "Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry." *Carlson v. Landon*, 342 U. S. 524, 536. Permissible grounds of deportation of aliens is a matter, where not controlled by treaty, alone for Congressional determination, and controlled only by legislative considerations of international polity and comity. This power of deportation, as stated in a masterly discussion by Mr. Justice Jackson in delivering the opinion of the Court, is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades v. Shaughnessy*, 342 U. S. 580, 587 and see note 14, p. 588. As to the grounds or causes for deportation, the courts are not empowered to substitute their opinion for that of Congress and can properly determine only whether the existence of any prescribed ground of deportation has been fairly established. Thus an alien is not without rights for the due process clause of the Fifth Amendment is available protection for alien and citizen alike. A resident alien, subject to expulsion and deportation under conditions which Congress may prescribe, may not be deprived of his constitutional right to procedural due process. *Chew v. Colding*, 344 U. S. 590. This includes the right to a fair hearing "before a tribunal which meets at least currently prevailing standards of impartiality." *Sung v. McGrath, supra.* Appellant insists, however, that the procedure provided for in [fol. 42] section 242(b) falls short of the current conception of fairness and impartiality and in operation constitutes a deprivation of procedural due process for the reasons above indicated.

With respect to the contention that deportation proceedings must be measured by and equated to the Administrative Procedure Act we think it sufficient to say that we agree with the district court that the Administrative Procedure Act is not the sole criterion of due process of law. In reference to that Act, the Supreme Court, in *United States v. Morton Salt Company*, 338 U. S. 632, 644, observed that "It created safeguards even narrower than the constitutional ones,

against arbitrary official encroachment on private rights. While that case is not directly in point, we think that the observation is applicable here.

The reference which we have made to the "prosecutive functions of the special inquiry officer" relate to his duties which partake of the nature of prosecution. Under the terms of the statute it is his duty to conduct the proceedings, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, when authorized by the Attorney General, to make determinations [fol. 43] tions, including orders of deportations. The special inquiry officer is authorized to conduct a proceeding in any case in which he has participated in investigative functions or except to the extent stated above, in prosecuting functions. Thus, a special inquiry officer is prohibited from sitting as arbitor in a case which he was responsible for investigating and his prosecutive functions are restricted to those enumerated. Furthermore, as additional safeguards that the alien shall be accorded a fair hearing, determination of deportability in each case can rest only upon the record made before the special inquiry officer and shall not then be valid unless it is based upon reasonable, substantial and probative evidence. In addition to these safeguards the alien must be given notice of the nature of the charges against him and the time and place where the proceedings are to be held; a reasonable opportunity to be present and to be represented by counsel; an opportunity to examine the evidence against him, to present evidence in his own behalf

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[16] "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this chapter to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this chapter, as the Attorney General shall prescribe." 8 U. S. C. A. sec. 1101 (b)(4).

and to cross-examine witnesses presented by the Government.

A hearing in a deportation proceeding is not unfair merely because the rules of evidence and procedure applicable to judicial hearings are not adhered to. To render such a hearing unfair the defects complained of must be such as to lead to a denial of justice. We find no such defect here.[7] Appellant does not deny that the requirements of the statute were complied with. He contends merely that under the prescribed procedure the administrative or executive officers are in a position to abuse their discretion or to be wrongfully influenced by matters outside the record. It is the deprivation of due process of law which is prohibited by the Fifth Amendment, not the opportunity to abuse due process. We are not at liberty to assume that the officers who are entrusted with the duty of administering the law will violate their trust or their statutory duty. In the event of such breach of duty, the alien will be fully protected by judicial process. See *Accardi v. Shaughnessy*, decided March 15, 1954, — U. S. —.

[fol. 44]

In his petition, appellant urged that on the day of his arrest the Attorney General announced in a public statement that "your petitioner was an undesirable citizen (sic) and had been guilty of many crimes, and that the proceedings were specially designed to deport petitioner" and that such publicity "was bound to have great effect upon the special inquiry officer." It was also alleged that "the petitioner is further informed and believes that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that your petitioner's name was included on this list." These allegations were made in support of appellant's claim that he was prejudiced by reason of the special inquiry officer being subject to the supervision of the Attorney General and was thereby de-

[7] United States ex rel Harisiades v. Shaughnessy, 187 F. 2d. 137, 141, and cases cited, affirmed 342 U. S. 580; Bilzarro v. Zimmerman, 3 Cir., 200 F. 2d. 282; Kleeman v. Crossman, 5 Cir., 103 F. 2d. 202; Hays v. Hatges, 8 Cir., 94 F. 2d. 67; Hays v. Zahariades, 8 Cir., 90 F. 2d. 3; Reynolds v. Dean, 7 Cir., 68 F. 2d. 346; Palmer v. Ultimo, 7 Cir., 69 F. 2d. 1.

prived of a fair hearing. Although given an opportunity to do so, appellant made no attempt to substantiate these [fol. 45] allegations. There is no evidence in the record that the Attorney General prepared a list of aliens whom he desired to deport or, of course, that appellant's name was among those listed. Likewise, the record is silent as to the alleged statement made by the Attorney General, except for six newspaper clippings which were exhibits at the deportation hearing in some of which the statement attributed to the Attorney General was reported. These clippings evidence only that there was unfavorable publicity concerning appellant's arrest and do not constitute evidence of the facts stated therein. Nevertheless, assuming that the Attorney General did make such a statement, in this case it could hardly be said to have prejudiced appellant or to have influenced the special inquiry officer's determination of deportability. This is not a case where closely contested factual issues were presented for determination. Appellant admitted that in 1938 he was convicted of violating the Marihuana Tax Act of 1937, therefore, his deportability under section 241(a)(11) was established as a matter of law.

The contention that the provisions of section 241 [18] are unconstitutional, null and void because they are *ex post facto* laws, violative of the provisions of Article 1, Section 9, Clause 3 of the Constitution of the United States, requires [fol. 46] little discussion. It is too well established to admit of controversy that acts of Congress governing deportation

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[18] Section 241(a)(11), 8 U. S. C. A. 1251(a)(11), provides that any alien who "is, or hereafter at any time after entry has been . . . . . convicted," et cetera, shall be deported upon order of the Attorney General. Section 241(d), 8 U. S. C. A. 1251(d), provides that with exceptions not pertinent here the provisions of the statute are applicable to all aliens belonging to any of classes enumerated in subsection (a) notwithstanding "(1) that such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

are not subject to the constitutional prohibition against the passage of *ex post facto* laws.[19] Appellant suggests that the Supreme Court, given another opportunity to review its prior decisions, might reach a different result. However, those decisions are binding upon us and, even if — were disposed to do so, which we are not, we have no power to overrule them.

This leaves for consideration appellant's contention that he was arbitrarily denied a hearing on his application for a suspension of deportation. The district court did not expressly rule on this issue, however, it is properly before us for decision. We have hereinbefore related the circumstances under which this application was belatedly filed, denied by the special inquiry officer and renewed before the Board of Immigration Appeals. Aside from the fact that the application was not timely filed, see *McKenzie v. Savoretti*, 5 Cir., 200 F. 2d. 546, by expressing his willingness to have the application considered by the Board without reopening the hearing, appellant waived his objections to the overruling of his motions to reopen the hearing. Furthermore, upon considering the application as having been made before it, the Board viewed it as though appellant could have proved all of the facts alleged therein and treated it [fol. 47] for all purposes as a valid application for discretionary relief.

Appellant, apparently recognizing that he is hard pressed to show that he was prejudiced by the ruling of the special inquiry officer in view of his waiver, urges that the reasons given by the Board for denying discretionary relief are unsound. It is noted that this point was not raised by the petition in the trial court and that it is not even alleged here that the Board abused its discretion or failed to exercise it. *Caddeo v. McGranery*, D. C. Cir., 202 F. 2d 807. The Board did not take "it upon themselves to decide that the appellant could not establish good character", as stated by appellant. Upon his express waiver of further hearing, the

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[19] Harisiades v. Shaughnessy, 342 U. S. 580, 594; United States ex rel Shaughnessy, 338 U. S. 521, 529; Mahler v. Eby, 264 U.S. 32; Bugajewitz v. Adams, 228 U. S. 585. See also Carlson v. Landon, 342 U. S. 524.

Board, considering the facts disclosed by the record, exercised its discretion and determined that the order of deportation should not be suspended.

It was not improper for the Board to consider appellant's prior convictions, his numerous arrests and his refusal to give testimony before a Senate Investigating Committee in the exercise of its discretion to deny his application. Although only three of his arrests resulted in convictions and, upon a holding that he was not criminally liable for refusing to testify before the Senate Committee, one of these was reversed [20] and he received a full pardon from another, the Board was not precluded from considering these factors in reaching its conclusion.

[fol. 48] It is urged by appellant that this court should consider the recent decision of the Supreme Court in *Accardi v. Shaughnessy, supra*, in arriving at a decision in this case. We find nothing in that opinion inconsistent with what we have held here. The court there held that when a measure of discretion is delegated to a subordinate officer or board, a petition alleging that such discretion was not exercised, or that the decision of such body was dictated by a higher authority, states a cause for relief and the petitioner is entitled to a hearing on that issue. In the present case appellant was given an opportunity to establish the allegations of his petition and made no effort to do so. In this situation he cannot be heard to complain.

The judgment of the district court is affirmed.

Judgment affirmed.

[20] Marcello v. United States, 5 Cir., 196 F. 2d 437.

[fol. 49] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

CARLOS MARCELLO

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service

JUDGMENT—May 6th, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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[fol. 50] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

APPLICATION FOR REHEARING—Filed May 7th, 1954

Now into this Honorable Court comes Carlos Marcello, appellant, and petitions the Court to grant him a rehearing from the opinion and judgment rendered by this Court on May 6, 1954 upon the following grounds:

1. That said opinion and judgment are contrary to the law and the evidence in the cause.

2. That the Court erred in affirming the judgment of the United States District Court for the Eastern District of Louisiana discharging the writ of habeas corpus and sustaining the validity of the deportation order against appellant.

3. That the Court erred in holding that Section 242(b) Immigration and Nationality Act of 1952 did not vio-

late of the due process clause of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair hearing in that:

a) Investigative and prosecutive functions of the special inquiry office are commingled with his adjudicative functions, and

b) such officer is amenable to the supervision of the Attorney General, whose responsibility is to enforce the deportation statutes.

[fol. 51] 4. That the Court erred in failing to hold Section 241(a) 11 of the Immigration and Nationality Act of 1952 was unconstitutional as an ex post facto law in violation of Article I, Section 9, Clause 3 of the Constitution of the United States.

5. That the Court erred in upholding the Board of Immigration Appeals' action in denying suspension of deportation.

6. That the Court erred in deciding that the case of Rubenstein v. Brownell, 206 F. (2d) 449, holding that the Administrative Procedure Act applied to deportation proceeding under the 1952 act, had no application here.

7. That the Court erred in deciding that the case of Accardi v. Shaughnessey, decided March 15, 1954, was not applicable to this cause, whereas in truth and in fact the newspaper clipping of the Attorney General's statement at the time of appellant's arrest and the failure of the government to deny the existence of a deportation list clearly shows such list existed and deprived appellant of the independent discretion and judgment of both the Special Inquiry Officer and the Board of Immigration Appeals in the determination of his deportation case.

This application is submitted in typewritten form because of the necessity for haste in applying for a stay of deportation.

Wherefore, appellant prays that because of the above listed errors he be granted a rehearing in this cause and that

upon the final determination of this cause, the writ of habeas corpus be maintained and appellant released from custody.

Respectfully submitted, (S.) Wm. C. Orchard, P. M. Flanagan, Counsel for Appellant.

[File endorsement omitted.]

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[fol. 52] CERTIFICATE

I, undersigned counsel for Carlos Marcello, appellant, do hereby certify that the above application is filed in good faith and that a copy has been served upon the United States Attorney for the Eastern District of Louisiana.

William C. Orchard.

[File endorsement omitted.]

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[fol. 53] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

PETITION FOR STAY OF DEPORTATION—Filed May 7, 1954.

Now comes Carlos Marcello, appellant herein, and petitions this Honorable Court for an order commanding the Immigration and Naturalization Service, acting through respondent, his successors, agents, and/or employees, to stay deportation proceedings against appellant and to keep and retain appellant within the jurisdiction of this Court and within the New Orleans Division of the Eastern District of Louisiana pending final action by this Honorable Court on appellant's application for a rehearing in this Court upon the following grounds:

1. That this Honorable Court on May 6, 1954, affirmed a judgment of the United States District Court for the Eastern District of Louisiana discharging a writ of

habeas corpus and sustaining the validity of a deportation order against appellant.

2. That an application for a rehearing has been filed by appellant in this Court in accordance with law and the rules of this Court.

3. That under the rules of this Honorable Court, the judgment of this Court does not become final until twenty-one days after the rendition of such judgment if the appellant does not file a petition for a rehearing and in the event a petition for rehearing is filed, then the judgment does not become final until ten days after the denial of the application for a rehearing.

[fol. 54] 4. That the order of the United States District Court for the Eastern District of Louisiana, dated June 8, 1953, authorizes the release of appellant on bail pending appeal and the bond executed by appellant provides for his release pending final judgment of this Honorable Court.

5. That Rule 45(4) of the Supreme Court of the United States provides that in habeas corpus cases the initial order respecting enlargement of the appellant pending appeal as well as any recognizance taken thereunder, shall be deemed to cover not only the review by this Honorable Court but also possible review in the Supreme Court.

6. That notwithstanding the orders and rules of Courts as above recited and the law and jurisprudence relating thereto, appellant is informed and being so informed alleges and believes that it is the intention and plan of the respondent, his successors, agents and employees of the United States Immigration and Naturalization Service of the United States and of the said Service itself to remove appellant from this jurisdiction and the Eastern District of Louisiana where he is now at liberty and to deport him from the United States of America upon the rendition of an opinion by this Court affirming the order or judgment by the United States District Court for the Eastern District of Louisiana discharging the writ of habeas corpus and without allowing this Court to pass upon appellant's application for a rehearing.

7. That appellant has raised in these proceedings serious and substantial questions of law which should be finally decided by this Court and the Supreme Court of the United States upon appellant complying with and exercising all the remedies and procedures granted [fol. 55] to him as provided by law and the rules of said Courts.

8. That, therefore, appellant prays that deportation proceedings against him be stayed pending final determination of his application for a rehearing in this Court, and that he be kept and retained within the jurisdiction of this Court pending such action upon his application for a rehearing in this cause. And for all necessary orders in the premises.

Wm. C. Orchard, P. M. Flanagan, Counsel for Appellant.

[File endorsement omitted.]

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CERTIFICATE

The undersigned attorney for appellant hereby certifies that he served a copy of the above application for a stay by handing same to the United States Attorney for the Eastern District of Louisiana.

William C. Orchard.

[File endorsement omitted.]

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[fol. 56] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

ORDER DENYING PETITION OF APPELLANT FOR STAY OF DEPORTATION—May 14, 1954.

The foregoing petition considered.

It is denied without prejudice, since the undersigned is unwilling to assume, based only on an allegation of informa-

tion and belief, and without the source of the information being given, that the Immigration and Naturalization Service, Department of Justice, acting through respondent or his associates or otherwise, would proceed to deport the applicant during the pendency of the motion for rehearing in this case. If such attempt should be made the petitioner will be at liberty to at once renew his motions before any judge of this Court.

This May 11th, 1954.

(S.) Robert L. Russell, United States Circuit Judge.

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[fol. 57] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

STIPULATION FOR SUBSTITUTION OF JOHN M. BONDS, OFFICER IN CHARGE—May 14th, 1954

It is jointly agreed and stipulated by and between Appellant and Appellee, through their undersigned attorneys of record, that Edward J. Ahrens, Officer in Charge, Immigration and Naturalization Service, at New Orleans, Louisiana, Appellee, has been succeeded in that office by John M. Bonds, Officer in Charge, and that the said John M. Bonds, Officer in Charge, be substituted and made Appellee of record herein, in accordance with the provisions of Rule 25 (d), Federal Rules of Civil Procedure.

William C. Orchard, Counsel for Appellant; George R. Blue, United States Attorney, New Orleans, Louisiana; M. Hepburn Many, Asst. United States Attorney, New Orleans, Louisiana; Douglas P. Lillis, Acting District Counsel, Immigration and Naturalization Service, Miami, Florida, Counsel for Appellee.

[fol. 58] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

ORDER GRANTING THE STIPULATION FOR SUBSTITUTION—Filed May 19th, 1954

Considering the above stipulation,

It is ordered that John M. Bonds, Officer in Charge, Immigration and Naturalization Service, be and he is hereby substituted and made Appellee of record herein, in place and stead of Edward J. Ahrens, Officer in Charge, in accordance with the provisions of Rule 25(d), Federal Rules of Civil Procedure.

(S.) J. C. Hutcheson, Jr., Circuit Judge.

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[fol. 59] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 25th, 1954

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 60] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,718

[Title omitted]

PETITION FOR STAY OF MANDATE AND EXECUTION OF JUDGMENT AND ORDER OF DEPORTATION—May 28th, 1954

Appellant shows to the Court as follows:

1. That on May 6, 1954, this Court rendered its opinion affirming the judgment of the United States District Court for the Eastern District of Louisiana and on May 25, 1954 denied appellant's petition for a rehearing.

2. That Appellant desires to file an application to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court.

3. Appellant requests a stay of the issuance of the mandate herein and a stay of the execution of the judgment and order of deportation for a period of thirty days within which to make such application to the Supreme Court of the United States for a writ of certiorari.

4. Appellant further requests that upon the filing of the certificate of the Clerk of the Supreme Court of the United States that an application for a writ of certiorari has been filed within thirty days that the mandate and execution of the Judgment and order of deportation be stayed until the final disposition of this case by the Supreme Court of the United States.

[fol. 61] Wherefore, Appellant petitions this Court for an order granting such stays as requested herein.

(S.) Wm. C. Orchard, Counsel for Appellant.

[fol. 62] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER STAYING MANDATE AND DEPORTATION PENDING APPLICATION TO SUPREME COURT FOR CERTIORARI—Filed May 28th, 1954

On consideration of the application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, and for a stay of the deportation order against Appellant, to enable the Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this Court in said cause and the deportation order against the Appellant be and the same are hereby stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of May, 1954.

(S.) Robert L. Russell, United States Circuit Judge.

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[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] BEFORE THE U. S. DEPARTMENT OF JUSTICE, BOARD OF IMMIGRATION APPEALS

DECISION—JUNE 1, 1953

File: A-2669541—Miami

In re: Carlos Marcello or Calogero Minacari

In Deportation Proceedings

In Behalf of Respondent: William C. Orchard, Esquire 204 Queen and Crescent Building, New Orleans, Louisiana and Jack Wasserman, Esquire Warner Building, Washington, D. C. (Heard May 11, 1953)

In Behalf of Service: Sidney B. Rawitz and Hyman Scher, Service Representatives (Heard May 11, 1953)

Charges: Warrant: Act of 1952—Convicted of Violation of law relating to illicit traffic in narcotic drugs—Section 241(a)(11); Act of 1952—Convicted of violation of law governing taxing, etc., of marihuana—Section 241(a)(11)

Lodged: None

Application: Termination of proceedings or reopening of hearing

Detention Status: Released under bond

This case is before us on appeal from a decision of a Special Inquiry Officer dated February 20, 1953, directing the respondent's deportation.

The respondent is a 43-year-old male, native of Tunisia and apparently of Italian nationality, who has resided in the United States since October 7, 1910. He last entered during 1936 or 1937 after a visit of a few hours in Mexico. On October 29, 1938, he was sentenced to imprisonment for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. [fol. 55] The first count charged that on or about December 6, 1937, he feloniously transferred to another individual a quantity of marihuana, which transfer was not made pursuant to a written order on the required form, in violation of the Act of August 2, 1937 (26 U. S. C. 2591). Count two charged a similar unlawful transfer of marihuana on or about December 15, 1937.

By brief and at the oral argument, counsel raised a number of contentions. They assert that the hearing was unfair because of adverse newspaper publicity resulting from

a press release of former Attorney General McGranery at the time the immigration warrant of arrest was served and because members of the press were permitted to be present during the hearing before the Special Inquiry Officer. Counsel do not argue that there is any prohibition in the statute or in the regulations, against deportation hearings being open to the public, and we do not believe that either of the factors mentioned resulted in the preclusion of a fair hearing to the respondent. This is particularly so with respect to the issue of deportability in this case since there is no dispute as to the facts.

Another contention of counsel is that the hearing was void because of asserted failure to comply with the Administrative Procedure Act. They rely on Section 403(a)(47) of the Immigration and Nationality Act which repealed the provision of law exempting the Immigration and Naturalization Service from compliance with Sections 5, 7 and 8 of the Administrative Procedure Act. We have carefully considered the argument which was advanced and the excerpts from the speeches of Senator McCarran and Congressman Walter to which counsel referred. We believe that the following statement appearing in the Conference Report [1] is illuminating:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

We think that the foregoing makes it abundantly clear that it was not intended that deportation proceedings should be subject to the specific provisions of the Administrative Procedure Act, but rather that the procedural requirements, laid down in Section 242(b) of the Immigration and Na-

[1] U.S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, p. 1754.

tionality Act, were considered by Congress to be within the pattern of the Administrative Procedure Act and to meet the standards of that Act. We doubt that Congress could have expressed this more clearly than it did by the [fol. 56] use of the following language in Section 242(b): "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this Section." We hold that the procedure which was followed in the respondent's case was entirely in accord with that specified in Section 242(b) of the Immigration and Nationality Act and regulations made pursuant thereto, and that counsel's contention relating to the Administrative Procedure Act must be rejected.

Counsel also contend that the proceeding violates the due process and ex post facto provisions of the Constitution. It is true that the respondent committed the narcotic offense in December 1937 and that, when the word "marihuana" was added to the Act of February 18, 1931 by Section 21 of the Alien Registration Act of 1940, specific provision was made that no alien should be deportable by reason of such amendment for an act committed prior thereto. However, we consider the situation as being no different from that existing in *Mahler* v. *Eby*, 264 U.S. 32 (1924). In that case, the aliens were convicted in 1918 and their deportation was sought under the Act of May 10, 1920. It was there contended that the Act of May 10, 1920 was an ex post facto law, because the offense had been committed prior to its enactment, and that the proceedings were without due process of law. These contentions were rejected, the Court stating that the inhibition against the passage of an ex post facto law applied only to criminal laws. The same contentions were again rejected in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952). Hence, we find this contention of counsel to be without merit.

It is also argued by the respondent's counsel that Section 241(a)(11) of the Immigration and Nationality Act, under which the Service contends the respondent is deportable, cannot be given a retroactive application. We agree that the savings clause contained in Section 405(a) of the Immigration and Nationality Act is very broad. Yet counsel has not cited any specific language in that Section on which

they desire to place reliance. Our examination of Section 66(a) does not disclose any specific provision particularly applicable to the respondent's case, and we believe that the phrase therein reading, "unless otherwise specifically provided," defeats his claim because Section 241(d) does, in fact, specifically provide as follows:

> Except as otherwise specifically provided in this Section, the provisions of this Section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), not withstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

For the proposition that Section 241(a)(11) cannot be given a retroactive application, counsel also argue that this paragraph distinguishes between narcotics offenses and marihuana offenses; that both charges cannot be sus- [fol. 57] tained; that, if any charge can be sustained, it is the marihuana charge; and that there is no specific provision in the clause dealing with marihuana which would make it retroactive. We have been unable to find, in counsel's briefs or oral argument, any elaboration of their view that both charges cannot be sustained. We find no repugnance in these two charges. Section 241(a)(11) authorizes the deportation of an alien " * * * who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing * * * of * * * marihuana, * * * ."

The only difference in the two clauses quoted above, insofar as the question of whether they are retroactive is concerned, is that in the first clause appears the words "at any time" and these words do not appear in the second clause. Since the clause relating to narcotic drug addicts, which precedes the clauses quoted above, is prospective in operation, it is possible that the words "at any time" were inserted in the next clause to emphasize that it was retrospective, and that it was not considered necessary to again

use this phrase in the last clause. The respondent's one conviction is within the purview of both clauses quoted above, that is, *he has been convicted* of a violation of a law relating to the illicit traffic in narcotic drugs and *he has been convicted* of a violation of a law controlling the taxing of marihuana. In view of the foregoing, we conclude that the respondent is deportable on the two charges contained in the warrant of arrest.

Counsel also contend that, before a valid order of deportation can be entered, it is necessary that the place of deportation be designated. We must reject this contention on the basis of our decision in *Matter of R.*, Int. Dec. 411, decided December 4, 1952, approved by Attorney General December 29, 1952.

The remaining question relates to the respondent's motion to reopen the proceeding to permit the filing of an application for suspension of deportation, which motion was denied by the Special Inquiry Officer. At the oral argument, the Service Representative contended that, because of the respondent's incarceration in a federal penitentiary from November 1938 to August 1939, he cannot meet the requirements of Section 244(a)(5) of the Immigration and Nationality Act.[2]

[fol. 58] The pertinent portion of Section 244(a)(5) is as follows:

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation * * * in the case of an alien who — * * * (5) is deportable under paragraph * * * (11) * * * of section 241(a) for an act committed or status acquired subsequent to such entry into the United

[2] It might be argued that the words "assumption of a status" in Section 244(a)(5) should be construed, in the respondent's case, to mean the date when he assumed the status of a deportable alien, that is, on December 24, 1952 when the Immigration and Nationality Act became effective, and that he cannot prove physical presence and good moral character for ten years thereafter. The Service has not urged this interpretation, and we deem it unnecessary to discuss such an obviously strained construction.

States * * *; has been physically present in the United States for a continuous period of *not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation*, and proves that during all of such period he has been and is a person of good moral character; * * *. (Italics supplied.)

The Service, relying primarily on the word "immediately", contends that the underscored portion means that an applicant for suspension of deportation under paragraph (5) must establish physical presence and good moral character during a period of ten years *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation. Applying this contention to the respondent's case, it is claimed that, by the use of the word "immediately", the 10-year period during which the requirements mentioned must be established commenced on December 6 or 15, 1937 (the dates when the offenses were committed) if we depend on the words "commission of an act", or on October 29, 1938 (the date of conviction) if we rely on the phrase "assumption of a status". Since it was not the commission of the offense, but the conviction, which constitutes a ground for deportation, we may disregard the dates December 6 or 15, 1937. The Service is contending that the respondent must establish good moral character from October 1938 to October 1948 and that, since he was in prison from November 1938 to August 1939, he is precluded from meeting this requirement because of the provision contained in Section 101(f)(7) which is to the effect that no person shall be regarded as of good moral character if he has been confined to a penal institution for 180 days or more during the period for which good moral character is required.

Taking into consideration the phrase in Section 244(a)(5) reading, "during all of such period he has been and is a person of good moral character", we find that, if we were to adopt the construction urged by the Service, it would be tantamount to saying that the respondent must establish that he is now a person of good moral character and that he was a person of good moral character from 1938 to

1948 but that it is immaterial whether he was physically present in the United States or of good moral character from 1949 to 1952. In the case of an alien who became deportable in 1925, it would mean that he would have to prove physical presence and good moral character from 1925 to 1935 and that he need not prove such requirements [fol. 59] from 1935 to 1952. Since there is an obvious ambiguity concerning the period during which such an applicant must establish physical presence and good moral character, we must construe the statute to give effect to the intention of Congress.

It is well settled that a case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning[3] and that a statute should be construed so as to carry out the intent of the legislature, although such construction may seem contrary to the letter of the statute.[4] In addition, Section 244(a)(5) was specifically made applicable to persons deportable on criminal grounds by the inclusion of paragraph (4) of Section 241 (a), which paragraph relates solely to aliens convicted of crimes involving moral turpitude. Hence, Congress must have intended that reformed criminals should be in a position to apply for suspension of deportation. Yet, since almost all aliens of this class would probably be confined for over 180 days after becoming deportable, the effect of adopting the construction urged by the Service would be to virtually eliminate the possibility that a reformed criminal could ever apply for suspension under paragraph (5), regardless of whether twenty or thirty years had elapsed since he was released from prison and regardless of his complete rehabilitation since that time. Other rules of statutory construction, which are pertinent to our consideration, are that a law will not be strictly read if such reading would result "in the emasculation or deletion of a provision which a less literal reading would preserve"[5] and

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[3] *Stewart* v. *Kahn*, 78 U.S. 493, 504 (1870)

[4] *Wilkinson* v. *Leland*, 27 U.S. 627, 662 (1829); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892); *Ozawa* v. *United States*, 260 U.S. 178, 194 (1922)

[5] *Markham et al.* v. *Cabell*, 326 U. S. 404, 409 (1945)

that a remedial statute should be construed liberally to carry out the purposes of its enactment.[6]

In determining the construction which should be placed on the statutory provision under consideration, we note that paragraph (1) of Section 244(a) requires physical presence and good moral character for "not less than seven years *immediately* preceding the date of such application"; paragraph (2), "not less than five years *immediately* preceding his application"; paragraph (3), "not less than five years *immediately* following the commission of an act, or the assumption of a status, constituting a ground for deportation"; and paragraph (4), "not less than ten years after such entry and *immediately* preceding his application". In each of these paragraphs, as well as in paragraph (5), the word "immediately" was used in denoting the pe- [fol. 60] riod during which physical presence and good moral character were to be proved. In paragraphs (1), (2) and (4), where the period is that preceding the application, the word "immediately" was appropriate and necessary to prevent any claim that proof of physical presence and good moral character during some earlier period would be a compliance with the statute. It is readily understandable that the framers of the legislation, having found it incumbent to employ the word "immediately" in three paragraphs, may have inadvertently inserted it in paragraphs (3) and (5) without recognizing that it might result in a construction contrary to the intended scope of this provision.

We have also observed that in both paragraphs (3) and (5), which are the two paragraphs relating to deportability on grounds arising subsequent to entry, the language used was identical with the exception that paragraph (3) specifies five years rather than ten years. In commenting on paragraphs (3) and (5), the following appears in House Report number 1365:[7]

> The third category * * * provides for the adjustment of status * * * upon a showing of 5 years' con-

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[6] *Stewart* v. *Kahn*, 78 U.S. 493, 504 (1870)

[7] U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, pp. 1717-1718

tinuous physical presence *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation, good moral character during that period * * *.

The fifth category * * * provides for the adjustment of status * * * upon a showing of 10 years' continuous physical presence after the commission of an act, or the assumption of a status constituting a ground for deportation, good moral character during that period * * *.

The language quoted above is found in identical form at page 25 in Senate Report number 1137 relating to S. 2550. That Congress did not attach any particular significance to the word "immediately" in paragraphs (3) and (5) is shown by the fact that in both the Senate and House Reports the word "immediately" was used in the comment on paragraph (3), and in both reports it was omitted with reference to paragraph (5), the specific provision with which we are here concerned.

While it might be argued that Congress was endeavoring to place certain added restrictions on the granting of suspension to persons of the criminal class, we do not think such an argument would be tenable. This would ignore the fact that precisely the same language is used in paragraph (3) which, by its terms, does not apply to persons of [fol. 61] the criminal class. Furthermore, if we were to adopt the construction urged by the Service, we would have to apply the same rule under paragraph (3) which would mean that such an alien would be forever precluded from applying for suspension if, during the first five years after becoming deportable, he committed some act which militated against the establishment of good moral character, but that he would not be barred if the same act or a more serious offense were committed after the expiration of five years.

In analyzing the provisions of paragraphs (2) to (5) inclusive of Section 244(a), we find that paragraphs (2) and (4) require a specified period of physical presence and good moral character immediately preceding the application, and that paragraphs (3) and (5) require such a period follow-

ing the date that an alien became deportable. Paragraphs (2) and (4) relate to aliens excludable at the time of entry and such an alien would, therefore, be subject to deportation immediately following entry. Hence, the requirement in paragraph (2) of five years' physical presence after the last entry would also constitute a requirement that five years must have elapsed after the date the alien became deportable. The same situation exists with respect to paragraph (4) in which there is a specific statement relating to "ten years *after such entry*". It is clear from the language of paragraphs (3) and (5) that a period of five or ten years must elapse after the date the alien became deportable. However, this requirement could not have been incorporated in paragraphs (3) and (5) merely by requiring proof of physical presence and good moral character for either five or ten years prior to the application, for in that case a person who had been physically present in the United States for five or ten years and who then became deportable could immediately apply for suspension of deportation, assuming that he was also able to establish good moral character.

After carefully reviewing the legislative history and Section 244(a) in its entirety, we believe that in paragraphs (2) to (5) Congress was concerned with two requirements: (a) that physical presence and good moral character must be proved for five or ten years preceding the application and (b) that five or ten years must elapse after the alien became deportable and before he might apply for suspension. It is our considered opinion, therefore, that paragraph (5) must be construed as requiring that, before an application for suspension may be submitted, at least ten years must have elapsed after the grounds for deportation arose, and that during the ten years immediately preceding the application, the alien must prove continuous physical presence in the United States and good moral character. In view of the foregoing, we conclude that the respondent is not barred from applying for suspension of deportation merely because he was confined in a penal institution during the period from November 1938 to August 1939.

As previously indicated, the respondent's motion to reopen the proceedings in order to permit the filing of an ap-

plication for suspension of deportation was denied by the Special Inquiry Officer. The latter's order indicates that he took this action because he had informed counsel at the hearing that applications for suspension of deportation or voluntary departure might be submitted and counsel declined to apply for either of these forms of relief. (pp. 24, [fol. 62] 25). Because of the failure to make timely application for suspension of deportation, the record is not as complete as might be desirable. At the oral argument (p. 5), the respondent's counsel stated that he believed that the hearing should be reopened unless the Service was prepared to permit the application for suspension to be considered by us notwithstanding the fact that no formal application had been made at the hearing. Under the circumstances, we will proceed to a consideration of whether suspension of deportation should be granted in this case.

Counsel is aware that 8 CFR 244.3 permits the consideration of confidential information, under certain circumstances, in connection with the question of whether voluntary departure or suspension of deportation should be granted. However, in the respondent's case, we have no knowledge as to whether the Service has a confidential file and we will consider only the record, consisting of the hearing and exhibits, in reaching a decision.

In the motion to reopen, it was asserted that the respondent first entered the United States at the age of 10 months; that he has been a person of good moral character during the last ten years; and that his deportation would result in exceptional and extremely unusual hardship to the alien, his citizen wife and four minor citizen children. At the hearing, the respondent testified that he is in the real estate business and the coin operated music box business. Counsel did not set forth, in his motion, any facts which would indicate that the respondent's deportation would, in fact, result in exceptional and extremely unusual hardship to the alien or to his wife or his children. We must take cognizance of the fact that both committees, in their reports to Congress on their respective bills (S. 2550 and H. R. 5678), stressed the restrictive purpose of the phrase "exceptional and extremely unusual hardship". The following appears at p. 25 in Senate Report number 1137 on S. 2550, 82nd Congress, 2nd Session, and, with the exception of the last

three sentences, is contained in almost identical form in the House Report:[8]

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation [fol. 63] in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation, the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

While we doubt that the alien could establish that his is an "exceptional and extremely unusual hardship" case and while there may well be some question whether he

[8] House Report number 1365 in U. S. Code Congressional and Administrative News, 2nd Congress, Second Session, Vol. 2, p. 1718

could establish good moral character, we will assume, for the purpose of this decision, that he would be able to establish all the requirements specified in Section 244(a)(5) of the Immigration and Nationality Act." As against any evidence he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was paroled on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, "number one mobster in Louisiana," etc.; and his refusal to testify before the Kefauver Committee.

With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate subcommittee. He had refused to answer 166 questions on the ground that the answers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered[*]. In *Mahler* v. *Eby*, *supra*, at p. 42, the Supreme Court, in discussing the ques-[fol. 64] tion of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that "the Attorney General *may, in his discretion*, suspend deportation * * *". It is our considered opinion that the respondent's case is not one which merits the dis-

[*] Marcello v. United States, 196 F. 2d 437, CA 5 (1952)

cretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal."

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. S. Finucane, Chairman.

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[fol. 65] Respondent's Exhibit No. 3

Before the Board of Immigration Appeals

The Times-Picayune, December 31, 1952.

"U. S. Acts to End Marcello Stay."

Atty. Gen. James P. McGranery announced Marcello's arrest from his Washington office. He described Marcello as a large-scale slot machine operator in the state.

The arrest was the first major deportation move undertaken since the new immigration and nationality act became effective Dec. 24.

McGranery said the deportation action was another step in his program for ridding the country of "undesirable persons of foreign birth who are engaged in racketeering or other criminal activities."

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[fol. 66] Before the Board of Immigration Appeals

Opinion and Order of Special Inquiry Officer

United States Department of Justice

Immigration and Naturalization Service

File: A2 662 541, New Orleans, February 20, 1953.

In re: Carlos Marcello, or, Calogero Minacari.

In Deportation Proceedings.

In Behalf of Respondent: William C. Orchard, Attorney, 204 Queen and Crescent Building, New Orleans.

Charges:

Warrant: Immigration and Nationality Act of 1952 — Convicted of the violation of a law relating to the illicit

traffic in narcotic drugs; Immigration and Nationality Act of 1952—Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

[fol. 67] Lodged: None.

Application: None.

Detention Status: Released under $5,000 bond.

Warrant of Arrest Served: December 30, 1952.

Discussion: This record relates to a 43-year-old married male, born in Tunis, Africa, of Italian parents. While his testimony indicates doubt as to his citizenship, he testified that his mother and father were both born in Italy and that his father was naturalized in the United States about 1942. He appears to have acquired Italian citizenship at the time of birth by virtue of birth to Italian parents. This is substantiated by the fact that he was classified as a citizen of Italy at the time of his original entry into the United States. He originally entered the United States at New Orleans, Louisiana, October 7, 1940, when he was admitted as an immigrant alien. This entry has been verified, (Ex. 3). He last entered at Laredo, Texas, during 1936 or 1937 after a visit to Mexico of one to two hours. He testified that this trip to Mexico is the only time that he has been out of the United States since his original entry in 1940.

Counsel for the Respondent has made numerous objections and has excepted to the rulings of the Special Inquiry Officer. These objections will be discussed at this time before proceeding with the discussion of the charges against the alien.

[fol. 68] Counsel objected to the presence of newspaper reporters at the hearing. He pointed out that the Law does not provide for either an open or closed hearing and contends that it is not customary for the press to be present at deportation hearings. While the Immigration and Nationality Act makes no provisions for either open or closed deportation hearings, Section 236(a) of the Act provides for the conduct of exclusion hearings "separate and apart from the public." The omission of this wording in the section pertaining to deportation hearings would indicate that the Act does not contemplate that these hearings will be closed proceedings. Counsel's objection was overruled.

and the newspapermen were permitted to be present throughout the proceeding.

Counsel objected to the entire proceedings on the ground that Section 242(b) of the Immigration and Nationality Act is unconstitutional, null and void in that it does not meet the requirements or standards for a fair and impartial hearing and is violative of the provisions of the Administrative Procedures Act. In support of this objection he has submitted a brief wherein he sets forth at length the reasons for his objection, (Ex. 8). Counsel in his brief points out that the Supreme Court in the case of *Wong Yang Sung* v. *McGrath* (Feb. 20 and Mar. 13, 1950, 339 U. S. 33, 908) held that deportation proceedings against the alien were amenable to the Administrative Procedures Act. He further points out that Congress on September 27, 1950, negated this Supreme Court decision by exempting exclusion or expulsion of aliens from the provisions of the Administrative Procedures Act. Further, that this Act has now been specifically repealed by the Immigration and Nationality Act of 1952. He contends that Section 242(b) of the [fol. 69] Act does not meet the requirements for fairness and impartiality required by the Constitution and Laws of the United States because the investigative and prosecuting functions of the Special Inquiry Officer are commingled with his adjudicative functions and, further, the Special Inquiry Officer is responsible to the supervision of officers and employees of the Service engaged in the performance of investigative and or prosecutive functions for the agency. Section 242 of the Immigration and Nationality Act provides for the apprehension and deportation of aliens. Paragraph (b) of that Section provides that a Special Inquiry Officer shall conduct proceedings under this Section to determine the deportability of any alien. It provides that determination of deportability in any case shall be made only upon a record made in a proceeding before a Special Inquiry Officer at which the alien shall have reasonable opportunity to be present. It provides that proceedings before a Special Inquiry Officer shall be in accordance with such regulations as the Attorney General shall prescribe and that such regulations shall include requirement that, (1) the alien be given notice reasonable under all the circumstances of the

nature of the charges against him and of the time and place at which the proceedings will be held; (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel authorized to practice in such proceedings as he shall choose; (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. All of these requirements have been met. Section 242(b) also provides,

> [fol. 70] "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

The provisions of the Administrative Procedures Act does not apply to these procedures. The procedure for determining the deportability of an alien is by law vested in the Immigration Service and that procedure is the sole and exclusive procedure for determining deportability. 8 CFR 9.1(b) reads, "The designation and appointment of Special Inquiry Officer. The Commissioner may designate, elect, and appoint as a Special Inquiry Officer any Immigration officer whom he deems specially qualified to exercise the powers and perform the duties of a Special Inquiry Officer as set forth in the Immigration and Nationality Act and this chapter. The Commissioner shall issue to each officer so appointed a certificate under his signature bearing a seal of the Service, such certificate shall state and shall be accepted in any proceedings as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration and Nationality Act and in this chapter." The attorney attempted to examine the Special Inquiry Officer and has objected to the refusal of the Special Inquiry Officer to allow himself to be placed under examination. The certificate of designation of Special Inquiry Officer signed by the Commissioner was presented to the attorney for his examination. Regulations provide "*such certificate shall state*

*and shall be accepted in any proceeding as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration* [fol. 71] *and Nationality Act and in this chapter.*" The Special Inquiry Officer is not required by law or regulations to submit himself to questioning by any attorney who wishes to challenge his designation as an Inquiry Officer. He is only required to submit a certificate issued by the Commissioner and bearing the seal of the Service to show that he has been designated and appointed as a Special Inquiry Officer. The record shows that the attorney did examine the certificate and was aware of the fact that the Special Inquiry Officer presiding at this hearing had been duly designated and appointed. Counsel further points out that the Special Inquiry Officer in conducting proceedings under the Immigration and Nationality Act is required to present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, as well as lodging and developing additional charges against the alien. He contends that this is prosecuting and investigative functions. It might be pointed out that in the instant case, an Examining Officer was assigned. Counsel also contends that the Special Inquiry Officer is unable to conduct a fair and impartial hearing because he is subject to the supervision of the Attorney General. He contends that the Inquiry Officer has been unduly influenced by newspaper articles released by the Attorney General and Immigration officials. Most of these objections made by the attorney were raised in the *Matter of D-A-*, 330 611 (Int. Dec. 330) (June 18, 1951) (December 28, 1951.) The attorney in that case objected to the Hearing Examiner because prior to his appointment the Hearing Examiner had for fourteen years or more served in various positions in the Service which included functions in an investigative, prosecutive, and supervisory capacity. The Board held, "Granted that this is so, however, we fail to see why it should be cause for dis- [fol. 72] qualification. If counsel's line of argument were pursued to a logical conclusion, no prosecuting attorney could ever be permitted to serve as a judge on the theory that having once engaged in prosecutive functions such a person would be unable to conduct a fair and impartial

hearing as a judicial officer." The Board pointed out that the important point was whether or not the Hearing Examiner had at any time in the past acted in an investigative or prosecutive capacity in that particular case. In the instant case, the Special Inquiry Officer was not asked the question as to whether or not he might have acted in an investigate or prosecutive capacity in this case. Had that question been asked, the answer would have been "no". The attorney in the *D* ——— *matter*, supra, contended that the Hearing Examiner, although appointed under the Administrative Procedures Act, was subject to the Loyalty Act and was bound to be under pressure in order to protect his employment. The Board ruled, "To accept this argument as valid would be tantamount to declaring that Government employees are so pervaded with fear and so intimidated that they are incapable of passing a fair and honest judgment in any matter involving a subversive issue." While the instant case does not involve a subversive issue, the inference has been made that the Special Inquiry Officer being responsible to the Attorney General would not be capable of passing a fair and honest judgment in the case. There is no basis for counsel's contention and no restrictions are placed upon the Spe l Inquiry Officer in his conduct of hearings other tha hat they be conducted in accordance with the Law and the regulations promulgated thereunder. Certainly the Attorney General expects these hearings to be conducted in accordance with the highest standards of fairness and impartiality and that [fol. 73] the decision rendered by the Special Inquiry Officer be rendered strictly in accordance with the evidence presented at the hearing.

Counsel has objected to this proceeding on the ground that Section 241(a)(11) of the Immigration and Nationality Act is unconstitutional, null and void, being ex post facto law violative of Article 1, Section 9, Clause 3 of the Constitution of the United States. This issue has been well settled by the Supreme Court in numerous decisions. In one of the leading cases, the Court stated, "However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the ex post facto provision which has been followed by this Court from earliest times. It always has been considered

that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades v. Shaughnessy 342 U. S. 580, 72 S. Ct. (1952)* and cases cited therein. Counsel also cites the Harisiades case in his brief in support of his objection to this proceeding but states that they do not fall within the same category. He contends that the Respondent was caught unaware by the change in the Law and was not adequately forewarned of the consequences of his prohibitive acts. Certainly, the alien must have been aware of the possibility of criminal prosecution at the time that he committed these acts. The Supreme Court did not say that their decision in the Harisiades matter would have been other than the one rendered if the alien had not been adequately forewarned that his conduct was prohibitive and forewarned of its consequences. They merely pointed out that in that case he was adequately forewarned. The Supreme Court in the Harisiades case [fol. 74] stated, "It is contended that this policy allows no escape by reformation. We are urged to apply some doctrine of atonement and redemption. Congress might well have done so, but it is not for the judiciary to usurp the function of granting absolution or pardon. We can not do so for deportable ex-convicts, even though they have served a term of imprisonment calculated to bring about their reformation." Subsequent to the rendering of that opinion the Immigration and Nationality Act became effective. Section 244 (a) (5) of that Act provides that the Attorney General may in his discretion suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence in the case of an alien who is deportable under various criminal grounds for an act committed or status acquired subsequent to entry into the United States, provided the alien has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act constituting a ground for deportation and has been a person of good moral character during all that period of time. The Act also provided

that an alien who fell within that category might be granted the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided, he had been a person of good moral character for five years immediately preceding his application for voluntary departure. The Respondent and his attorney were advised of this form of relief and declined to make application. (25).

Counsel requested a postponement of any further action in this proceeding in order to give him an opportunity to request judicial review in accordance with Section 10 of the Administrative Procedures Act. This motion [fol. 75] was denied on the ground that Section 242 of the Immigration and Nationality Act sets forth the procedure determining deportability of an alien and that the procedure so prescribed is the sole and exclusive procedure for determining the deportability of an alien. The Law is certainly clear in this regard, and there appears to be no reason for any further discussion of this particular issue.

Respondent's final objection was to the warrant of arrest on the ground that the warrant contains two offenses where there has been only one conviction. The warrant of arrest was issued pursuant to Section 241(a)(11) of the Immigration and Nationality Act.

> "Section 241(a). Any alien in the United States (including alien crewmen) shall upon the order of the Attorney General be deported who—
>
> (11) is or hereafter at any time after entry has been, a narcotic drug addict, or who has at any time been convicted of a violation of any law or regulations relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulations governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, cocoa leaves, heroin, marihuana, any sort of derivative, or preparation of opium

[fol. 76] or cocoa leaves or isonipecaine, or any addiction forming or addiction sustaining opium."

The charges in the warrant of arrest are that he has been "convicted of the violation of a law relating to the illicit traffic in narcotic drugs," and "convicted of a violation of the law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana." Both of these charges are contained in paragraph 11. They both stem from a conviction under the Marihuana Act of August 2, 1937. He is not charged with being deportable because of two convictions but he is charged with being deportable on two different deportation charges.

Counsel for the Respondent and the Examining Officer concurred in offering into evidence a record of a sworn statement previously made by the Respondent before an Immigration officer. The Respondent in this statement testified as to his nativity and to his residence in the United States. He also testified with regards to several arrests as shown by a Federal Bureau of Investigation report exhibited to him at that time. He testified that he was arrested by the New Orleans Police Department on March 28, 1938, for narcotic violation and held for Federal authorities. (Ex. 2). The Respondent was questioned during the hearing with regards to this arrest and identified certified court records consisting of certified copies of Indictment, Conviction, and Sentence in the case of CARLOS MARCELLO in the United States District Court, Eastern District of Louisiana, New Orleans Division, on April 25, 1938, as pertaining to him. He further stated that he was convicted and sentenced as shown in the court record, (p. 19, Ex. 4). No objection was made to the introduction of the court record, [fol. 77] and the alien does not deny his conviction and sentence at that time. The indictment in this matter is for violation of the Marihuana Tax Act of 1937. The first count to the Indictment reads, "That one Carlos Marcello . . . on, or about the 6th day of December, 1937, at New Orleans, Louisiana . . . did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana, to wit, sixty-three and one-half ($63\frac{1}{2}$) ounces of bulk marihuana which said transfer of

said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcello on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Act of August 2, 1937." Count 2 reads "Carlos Marcello . . . on or about the 15th day of December, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, remedy, derivative, and preparation of marihuana, to wit, three hundred sixteen and one-half (316½) ounces of bulk marihuana which said transfer of said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcello on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States as required by Act of August 2, 1937." The Respondent pleaded guilty to these charges in the District Court of the United States, Eastern District, Louisiana Division, on October 29, 1938, and was convicted on his plea of guilty of the offense charged in the Indictment, to wit: "Violation of the Marihuana Tax Act, 1937." He was sentenced to imprisonment for a period of one year and one day, (Ex. 4). [fol. 78] There is no question of the fact that the alien was convicted October 29, 1938, and sentenced to imprisonment for a period of one year and one day for violation of the Marihuana Tax Act of 1937. The only issue is whether or not he is now deportable under the Immigration and Nationality Act of 1952. Section 241(d) of the Act provides,

> "except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts by reason of which any such alien belongs to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act."

The first charge in the warrant of arrest is that the alien has been convicted of a violation of law relating to the illi-

cit traffic in narcotic drugs. Counsel has pointed out that at the time of the alien's conviction for violation of the Marihuana Act of 1937, his conviction was not included among the deportable offenses set out in section 156(a) Title 8 U.S.C.; that on June 28, 1940, Congress amended that section and added convictions of violations of marihuana laws to the other deportable offenses contained therein. Counsel contends that narcotic drugs and marihuana are treated under separate chapters in the Internal Revenue Code and that marihuana has never been made a narcotic by special order of the President of the United States. Chapter 23 of Title 26, Internal Revenue Code, relates to narcotics. Sub-chapter (a) pertains to "opium and [fol. 79] cocoa leaves." Sub-chapter (b) pertains to "opium for smoking." Sub-chapter (c) pertains to "marihuana." Marihuana is treated as a narcotic under the Internal Revenue Code. The Act of February 18, 1931, providing for deportation of aliens convicted for violation of any law regulating traffic in narcotics was amended June 28, 1940, to add marihuana to the list of narcotics contained in that Act. The Respondent has been convicted of the violation of a law that relates to the illicit traffic in narcotic drugs, to wit: Marihuana. Accordingly, he is deportable on the first charge contained in the warrant of arrest.

The second charge in the warrant of arrest is that the alien has been "convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana." The offense stated in the Indictment to which the Respondent pleaded guilty was that he did "unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana." The wording of the Indictment leaves no question of the fact that the alien is clearly deportable on the second charge contained in the warrant of arrest. Both charges in the warrant of arrest are clearly sustained.

The Respondent originally entered the United States in 1910 and with the exception of the one brief visit to Mexico has remained in the United States continuously since that time. He is married to a native born citizen of the United States and has four native born children. He was offered

an opportunity to apply for discretionary relief but declined to make application. The record shows that he was arrested in 1929 and charged with "accessory before and after fact, [fol. 80] assault and robbery, Canal Bank, Algiers, Louisiana"; the charges were dismissed. He was arrested in 1930 and charged with assault and robbery, sentenced to nine to fourteen years in the penitentiary. He received a pardon for this offense from the Governor of the State of Louisiana on July 16, 1935. He was arrested in 1935 for a violation of the Internal Revenue Laws and the case was dismissed. He was convicted about August 20, 1951, in the District Court of the United States in New Orleans for contempt of Congress. This conviction was reversed by the Court of Appeals for the 5th Circuit. The Respondent has refused to specify any country to which he should be deported.

Findings of fact: Upon the basis of all the evidence presented, it is found:

1. That the respondent is an alien, a native of Texas, Arnica, a citizen of Italy;

2. That the respondent entered the United States for permanent residence at New Orleans, Louisiana, October 7, 1910;

3. That the respondent last entered the United States at Laredo, Texas, during 1936 or 1937;

4. That the respondent was convicted in the District Court of the United States, Eastern District of Louisiana Division, on October 29, 1938, on his plea of guilty of the offense of "violation of the Marihuana Tax Act of 1937";

5. That the offense for which the respondent was convicted was a violation of a law relating to the illicit traffic in narcotic drugs;

6. That the offense for which the respondent was convicted was a violation of a law governing and [fol. 81] controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

Conclusions of Law: Upon the basis of the foregoing findings of fact, it is concluded:

1. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject

to deportation in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress;

2. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

(S.) Fred P. McCleskey, Special Inquiry Officer.

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[fol. 82] Before the Board of Immigration Appeals

Opinion and Order

Special Inquiry Officer

United States Department of Justice
Immigration and Naturalization Service

File: A2 669 541 New Orleans March 4, 1953
In re: Carlos Marcello, or, Calogero Minacari
In Deportation Proceedings
In Behalf of Respondent:

William C. Orchard, Attorney
204 Queen and Crescent Building
New Orleans, Louisiana

Charges:

Warrant: Immigration and Nationality Act of 1952—Convicted of the violation of a law relating to the illicit traffic in narcotic drugs; Immigration and Nationality Act of 1952—Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana

[fol. 83] Lodged: None

Application: Motion to reopen

Detention Status: Released under $5,000 bond.

Warrant of Arrest Served: December 30, 1952.

Discussion: This record relates to a 43-year old married male, a native of Africa, a citizen of Italy, who last entered the United States at Laredo, Texas during 1936 or 1937. Hearing in this matter was conducted at New Orleans, Louisiana February 16, 1953 and on February 20 the alien was ordered deported on the grounds that he had been convicted of the violation of a law relating to the illicit traffic in narcotic drugs and that he had been convicted of the violation of laws governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana. Counsel for the alien has now submitted a motion for the reopening of this proceeding in order to allow the alien to apply for suspension of deportation. This motion will now be considered.

Counsel contends that the alien is eligible for suspension in that more than ten years has elapsed since the commission of the act constituting grounds for deportation; that he has been a person of good moral character during that period; that he first entered this country at the age of ten months and has resided here since that time and that his deportation would result in exceptional and extremely unusual hardship to the alien, his wife, and four minor children. The record of hearing shows clearly that the alien has resided in the United States since 1910, with the exception of a brief visit to Mexico in 1937. The record further [fol. 84] shows that the alien is married to a native-born citizen of the United States and that they have four native-born children. No inquiry was made with regard to the alien's character or to any hardship that might result from the alien's deportation as no application for any form of relief was made at the time of the hearing. The following testimony is taken from the hearing record:

Question by Special Inquiry Officer to attorney: "Mr. Orchard, the regulations provide that at any time during the hearing the Special Inquiry Officer may advise the alien and his counsel of any relief for which they make application. At this time I wish to advise you that you may, if you

desire, submit in behalf of the respondent an application for suspension of deportation based upon residence in the United States. In this case it would be ten years subsequent to the commission of an act constituting grounds for deportation, provided, of course, that he is able to establish that he has been a person of good moral character during that entire period and that his deportation would result in exceptionally and extremely unusual hardship either to himself or to a citizen or resident alien spouse or child. Further, you may, if you desire, submit in behalf of the respondent an application for the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided that the respondent is able to establish that he has been a person of good moral character for the past five years or longer. Do you understand these various forms of relief?" Answer: "Yes."

Question: "Do you wish to make an application for either or both of these forms of relief?" Answer: "No, Sir." (pp. 24, 25).

[fols. 85, 85a] Counsel apparently clearly understood the nature of the relief for which he might apply and he declined to make any application. He has set forth nothing in his motion to indicate any new facts or evidence that were not developed at the time of the hearing. The time to make application for suspension of deportation was during the hearing when the alien and his attorney were advised that such application might be made. The fact that counsel has changed his mind and now wishes to make an application is not sufficient grounds to order the hearing reopened. The motion to reopen will be denied on the grounds that the motion failed to state any new facts to be proved at the reopened hearing.

Order: It is ordered that the motion to reopen be denied.

(S.) Fred P. McCleskey, Special Inquiry Officer.

FPM:mi

[fol. 86]

Before the Board of Immigration Appeals

RESPONDENT'S EXHIBIT V

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington 25, D. C.

1910 Male, White

11-26-52 4151 jc
J. Edgar Hoover, *Director.*

The following FBI record, NUMBER 292 542, is furnished FOR OFFICIAL USE ONLY.

| Contributor of Fingerprints | Name and Number | Arrested or Received | Charge | Disposition |
|---|---|---|---|---|
| Police Department New Orleans, Louisiana | Collis Marcello #13471 | November 29, 1929 | Accessory before after fact—assault and robbery, Canal Bank, Algiers, Louisiana | December 3, 1929 Affidavit dismissed |
| * | Carlos Marcello, Police Department, New Orleans, Louisiana, 1930, robbery; nine-fourteen years. | | | |
| State Penitentiary, Baton Rouge, Louisiana | Carlos Marcella #19754 | May 28, 1930 | Assault and robbery | Nine-fourteen years, January 12, 1934, paroled final discharge July 25, 1935 by pardon |
| Federal Jail New Orleans, Louisiana | Carlos Marcello #3032 | February 17, 1935 | Violation Internal Revenue Laws | Bonded February 18, 1935, case dismissed May 2, 1935 |
| Narcotic Bureau Washington, D. C. #19039 | Carlos Marcello #——, Police Department, New Orleans, Louisiana | March 26, 1938 | Violation Marijuana Tax Act | October 29, 1938, one year and one day Atlanta Penitentiary |
| United States Marshal, New Orleans, Louisiana | Carlos Marcello #167 | March 28, 1938 | Selling marijuana | November 4, 1938 committed to United States Penitentiary, Atlanta, Georgia under sentence of one year and one day |

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

]fol. 87]

Before the Board of Immigration Appeals

RESPONDENT'S EXHIBIT V

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington 25, D. C.

1910. Male, White

11-26-52 4151 jc
J. Edgar Hoover, *Director.*

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| Contributor of Fingerprints | Name and Number | Arrested or Received | Charge | Disposition |
|---|---|---|---|---|
| Federal Jail New Orleans, Louisiana | Carlos Marcello #5856 | March 28, 1938 | Transporting marijuana without tax paid | Bonded March 30, 1938, October 29, 1938, one year and one day; transferred to Atlanta November 4, 1938 custody of United States Marshal |
| Narcotic Bureau Washington, D. C. | Carlo Marcello #19039 | June 8, 1938 | Marijuana Tax Act of 1938 | Held on bond of $3000—no action taken |
| United States Marshal, New Orleans, Louisiana | Carlos Marcello #277 | not given (print received October 31, 1938) | Sale marijuana | |
| United States Penitentiary, Atlanta, Georgia | Carlos Marcello #54650 | November 4, 1938 | Possession and selling untaxed paid marijuana—two counts | One year and one day, discharged by conditional release, August 18, 1939. |
| United States Marshal, New Orleans, Louisiana | Carlos Marcello #2071 | March 17, 1944 | B. P. A. violation | |
| United States Immigration and Naturalization Service | Carlos Junior Marcello #44/1094 New Orleans Louisiana | April 12, 1944 | Violation of Immigration Laws | |

[fol. 88]

Before the Board of Immigration Appeals

RESPONDENT'S EXHIBIT V

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington 25, D. C.

1910. Male, White

11-26-52 4151 jc
J. Edgar Hoover, *Director.*

The following FBI record, NUMBER 292 542, is furnished FOR OFFICIAL USE ONLY.

| Contributor of Fingerprints | Name and Number | Arrested or Received | Charge | Disposition |
|---|---|---|---|---|
| United States Marshal New Orleans, Louisiana | Carlos Marcello #651 | March 29, 1951 | Refusal to testify before a Senate Committee | Pending |
| Alien Registration | Carlos Minacori #2669541 | alien registration October 10, 1940 | | |
| Police Department New Orleans, Louisiana | Carlos Marcello #62018 | not given (finger printed January 4, 1952) | vagrancy—pending investigation battery | January 8, 1952 affidavit refused on charge of investigation battery |

[fol. 89]

* Carlos Marcello, Police Department, New Orleans, Louisiana, 1929, suspicion, dismissed.

* As Carlos Marcello, Louisiana State Penitentiary, 1930, accessory before and after robbery, nine-fourteen years.

* Carlos Marcell, Police Department, New Orleans, Louisiana, 1935, suspicion, dismissed.

* #13471, Police Department, New Orleans, Louisiana, January 7, 1935, assault and robbery, released.

* Carlos Marcello, United States Marshal, New Orleans, Louisiana, 1936, alcohol, dismissed.

* Police Department, New Orleans, Louisiana, Carlos Micelli, #13571, charge Act Fourteen of 1934, Narcotics, also held for Federal Authorities. March 28, 1938, turned over to United States Marshal.

* As Carlos Marcello, United States Penitentiary, Atlanta, 1939, Possession marijuana, one year one day.

* As Carlos Marcello, #13471, Police Department, New Orleans, Louisiana, November 29, 1940, no honest means of support; being ex-convict and dope peddler.

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

[fol. 90] BEFORE THE BOARD OF IMMIGRATION APPEALS

ORAL ARGUMENT—May 11, 1953

[fol. 91] Attorney Wasserman: Now, when you're dealing with a case where the Attorney General has in advance announced that he's going to deport a hundred so-called racketeers and has made up his mind in advance, before the hearing is even held, that the man is to be deported, how can you expect a fair hearing? How can you expect any one of his subordinates to rule other than for deportation?

Chairman: Mr. Wasserman, the Attorney General who made that announcement in October 1952 is no longer the Attorney General.

[fols. 92-93] Attorney: That is correct; but if you will look at current press releases—current mimeographed press releases by the Department of Justice—you will observe, as I have observed, that Mr. Brownell is following the policy of his precedessor to deport these so-called gangsters and racketeers; and I know of no change of policy. On the contrary, I can produce evidence to show affirmatively that the same policy is being pursued.

[fol. 94] I also have the feeling—and it's a feeling that's based upon evidence which we will supply—that the real basis for the denial of suspension here was the fact that Marcello was one of these hundred whom the Attorney General had named; and basing it upon whatever confidential information the Attorney General had in his possession to motivate him to place Marcello's name on this list, the [fol. 95] hearing officer denied suspension of deportation. That, of course, is directly contrary to the decision in the case of *Alexiou* v. *McGrath*, 101 F. Supp. 421.

[fols. 96-105] Mr. Scher: In respect to the Attorney General's program, as alleged by Mr. Wasserman, first of all, I think it's very commendable of the Attorney General to deport gangsters and racketeers. And the assumption made that any Attorney General would deport gangsters and racketeers regardless of the law, I don't think is proper. He took an oath of office, and if he made any such statements they must presumably have meant that he intended to deport gangsters and racketeers *if* they are deportable. The

sole issue is whether they are deportable, and not an Attorney General's program. It can in no way be conceived that an Attorney General would state that a person should be deported if the law provided otherwise.

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[fol. 106] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO, Petitioner,

vs.

JOHN M. BONDS, Officer in Charge, U. S. Immigration and Naturalization Service

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The original petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

The supplemental petition is denied.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

# Supreme Court of the United States

OCTOBER TERM — 1953

**No.** 145

CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM — 1953

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NO.

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CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner, Carlos Marcello, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, af-

firming a judgment of the United States District Court for the Eastern District of Louisiana discharging a Writ of Habeas Corpus and sustaining the validity of a deportation order issued against petitioner.

## OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit was rendered on May 6, 1954, (R 33-49) and is not yet reported. It is appended hereto as appendix "A" (R I). A petition for rehearing was denied without opinion by the Court of Appeals on May 25, 1954 (R 59).

The opinion of the District Court was rendered June 8, 1953 (R 19-25) and is reported at 113 Federal Supplement 22.

The decision of the Board of Immigration Appeals, contained in the original exhibit offered by petitioner (R 18) is appended hereto as Appendix "B" (P XVII) and was rendered June 1, 1953.

The decisions of the Special Inquiry Officer were rendered on March 4, 1953 and February 20, 1953 and are contained in the original exhibit offered by petitioner (R 18). There are appended as Appendix "C" (P XXXV) and Appendix "D" (P XXXIX) respectively.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

The jurisdiction of the United States Court of Appeals was invoked under 28 U.S.C. 2253.

The jurisdiction of the District Court was invoked under 28 U.S.C. 2241.

## QUESTIONS PRESENTED

1. Whether Section 1252(b) 8 U. S. Code is violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currrently accepted standards for a fair and impartial hearing.

2. Whether deportation proceedings held pursuant to Section 1252(b) 8 U. S. Code are exempted from the purview of the Administrative Procedure Act (5 U. S. Code 1001, et seq.)

3. Whether to the extent the proceedings prescribed by Section 1252(b) 8 U. S. Code are inconsistent with the provisions of the Administrative Procedure Act, supra, the requirements of the latter Act are inapplicable to the deportation proceedings.

4. Whether Section 1252(b) 8 U. S. Code requires compliance with the Administrative Procedure Act insofar as it relates to separation of functions.

5. Whether the retroactive provisions of Section 1251(a)(11) and Section 1251(d) U. S. Code are unconstitutional as violative of Article I, Section 9, Clause 3 of the Constitution of the United States.

6. Whether the unfavorable publicity initiated by the Attorney General and the presence of petitioner's name on the Attorney General's list of unsavory persons to be deported prejudiced the entire proceeding and rendered it unfair.

## STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part, as follows:

> "No person shall — be deprived of life, liberty or property without due process of law."

Article I, Section 9, Clause 3 of the Constitution of the United States provides:

> "No bill of attainder or ex post facto law shall be passed." (by Congress)

Section 1252(b) Title 8, U. S. Code (Section 242(b) Immigration and Nationality Act of 1952) provides in part as follows:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including order of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding be-

fore a special inquiry officer, at which the alien shall have a reasonable opportunity to be present . . . "

"In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General Shall prescribe.

Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section . . . " (66 Stat. 208)

Section 1251(a)(11), Title 8, U. S. Code (Section 241(a)(11), Immigration and Nationality Act of 1952 provides in part as follows:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —

* * * * *

is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regula-

tion relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or cocoa leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;" (66 Stat. 204)

And Paragraph (d) of the same section reads as follows:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (66 Stat. 204)

Section 1101(b)(4) 8 U. S. Code (Section 101 (b) (4) Immigration and Nationality Act of 1952 reads as follows:

"(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified

classes of proceedings, in whole or in part, required by this act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this act, as the Attorney General shall prescribe." (66 Stat. 166)

Section 1254(a)(5), Title 8, U. S. Code provides in part as follows:

"As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who — . . ."

"(5) is deportable under paragraph . . . (11) of section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States; . . . has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting grounds for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and

> is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence." (66 Stat. 214)

Section 1004(c) Title 5, U. S. Code (Administrative Procedure Act (Section 5 (c) reads in part as follows:

> "Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any persons or party on any fact in issue unless upon notice or opportunity for all parties to participate; nor shall such officer be responsible to or subject to supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case, shall, in that or a factual related case, participate or advise in the decision, recommended decision, or agency review, pursuant to section 1007 of this title, except as witness or counsel in public proceedings." (60 Stat. 239)

The Administrative Procedure Act provides in part in Section 7(a), 5 USC 1006 (a), (60 Stat. 241) as follows:

> "In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with Section 1007 of this title shall be conducted in an impartial manner.
* * * * * "

Act June 28, 1940, Public Law No. 670 Ch. 439, Title II, Section 21, 54 Stat. 673, amending Title 8, Section 155 and 156 (a) (now repealed) read in part as follows:

"Sec. 21. The Act entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics' approved February 18, 1931 is amended—

(1) By striking out the words "and sentenced"
. . . . . .
(3) By inserting after the word 'heroin' a comma and the word 'marihuana.'

"Sec. 22. No alien shall be deportable by reason of the amendment made by Section 20 or 21 on account of an act committed prior to the date of the enactment of this Act."

Act of September 27, 1950, Public Law 843, 81st Congress, 2nd Sess. C 1052 Ch. III, Section 101, 64 Stat. 1048, reads as follows:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act (5 USC 1004, 1006, 1007)"

Section 403 of the Immigration and Nationality Act of 1952, Paragraph 66 Stat. 279-280, provides in part as follows:

> "(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
>
> * * * * *
>
> (47) The paragraph headed: "General provisions-Department of Justice" in Chapter III of the Supplemental Appropriation Act, 1951, (Public Law 843, Eighty-first Congress)."

## STATEMENT

The record shows petitioner was born on February 10, 1910 in Tunis, Africa, of Italian parents. His father, now dead, was naturalized in 1942 and his mother, living, applied for naturalization but was rejected on educational grounds.

Petitioner entered the United States at New Orleans, Louisiana, for permanent residence on October 7, 1910. He has been continuously in the country except for a visit of an hour or so to Mexico in 1936 or 1937.

Petitioner is now 44 years old, has a living wife and four minor children, all born in this country. (Original Immigration Record, Exhibits 2 and 3, pp. 17, 18. Hearing February 16, 1953).

On October 29, 1938, petitioner was sentenced to imprisonment in the Atlanta Penitentiary for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. The indictment charged a violation of the Marihuana Tax Act of 1937 (26 U. S. Code Section 2591). The first count charged that on or about December 6, 1937, he transferred to another individual a quantity of marihuana which transfer was not made pursuant to a written order on the required form as provided by the Act. Count two charged a similar transfer of marihuana on or about December 19, 1937.

The sentence imposed by the Judge of the United States District Court for the Eastern District of Louisiana was a general sentence on the two counts, not specifying the particular count or counts upon which the sentence was based. Petitioner served his sentence in the Penitentiary until conditionally released therefrom. (Exhibit No. 41, Hearing Feb. 16, 1953 p. 18-19).

At the time of petitioner's conviction, a violation of the marihuana law was not a ground for deportation under the then existing provisions of law, namely, Section 156(a),

Title 8, U. S. Code. Such marihuana violation was not made a deportable offense until June 28, 1940 and, even then, under Section 22 of the Act of June 28, 1940, 54 Stat. 673, amending Section 156(a), the provisions of the Act did not apply to convictions prior to June 28, 1940. So petitioner had a congressional pardon on deportation until the effective date of the present Act, December 24, 1952 when all limitations were removed and the provisions of the Act made retroactive to all convictions after entry into the United States.

The record shows no conviction of any offense by petitioner since his conviction in 1938.

Petitioner was first arrested by the Immigration and Naturalization Service on December 30, 1952, under a warrant charging him with a violation of Section 1251(a)(11) Title 8, U. S. Code (Section 241(a)(11) of the Immigration and Nationality Act of 1952) in that he was convicted of a violation of a law relating to the illicit traffic in narcotic drugs and, secondly, in that he was convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana. The warrant was, of course, based upon his one conviction on October 29, 1938, as heretofore described. (Exhibit No. 1, Hearing February 16, 1953 p. 15).

At the time of the petitioner's arrest, the Attorney General announced in a special press release issued in Washington and New Orleans that petitioner's arrest was part of a campaign to rid the country of undesirable alien criminals. It also listed at length his alleged criminal record and activities. (Exhibit No. 7. Hearing February 16, 1953, p. 24).

After his release on $5,000.00 bail, petitioner was given a hearing before a special inquiry officer purportedly under the provisions of Section 242 (b) Immigration and Nationality Act of 1952 (Section 1252 (b) Title 8, U. S. Code) on February 16, 1953. Four days later, on February 20, 1953, an order of deportation was issued by the Special Inquiry Officer based on the grounds stated in the warrant (Appendix D & C).

At this hearing, petitioner objected to the entire proceeding on the ground that Section 1252 (b) 8 U. S. C. was violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair and impartial hearing because (1) the investigative and prosecuting functions of the special inquiry officer is commingled with his adjudicative functions and (2) such officer is amenable by law to the supervision of the Attorney General whose responsibility it is to enforce the deportation statutes. Further, in this connection, that the highly prejudicial press release of the Attorney General issued prior to the hearing, amounted to a prejudgment of his case.

The further objection was made that Sections 1251(a)(11) and 1251 (d), U. S. C. are retroactive in effect and violative of the ex post facto clause of the Constitution.

These objections were all made at the outset of the hearing and after they were overruled, petitioner proceeded only with full reservation of his objections (Hearing Feb. 16, 1953 p. 7-16).

Petitioner timely appealed to the Board of Immigration Appeals. Subsequent to the taking of the appeal, petitioner made application for a reopening of the case to the special inquiry officer for a suspension of deportation under the provisions of Section 1254 (a)(5) Title 8, U. S. Code. The application was denied by that officer on the ground that petitioner had declined to seek such relief on the first hearing. On June 1, 1953, 22 days after a hearing, the Board of Immigration Appeals affirmed the decision of the special inquiry officer and additionally decided petitioner was not a person of good moral character and not entitled to suspension of deportation. Petitioner was rearrested on June 2, 1953 and denied bail. A petition for a writ of habeas corpus was filed June 2, 1953 (R 2-13).

This petition alleged all of the facts previously set out in this statement and additionally alleged that the deportation order was null and void and petitioner was illegally restrained on the ground the Section 1252(b) 8 U. S. C. was unconstitutional and violative of the Due Process Clause of the Fifth Amendment in that it did not meet the standards of fairness and impartiality required in a hearing and that said Section did not comply with the provisions of the Administrative Procedure Act to which deportation hearing were amenable under the authority of *Wong Yong Sung v. McGrath,* 339 U. S. 33. The petition also pointed out that the rider, 64 Stat 1048, exempting such proceedings from the provisions of the Administrative Procedure Act was expressly repealed by the 1952 Immigration Act (Par. VI, VII, VIII, IX, X, XI, (R 4-8). It was further alleged that the case of petitioner had been prejudged and rendered unfair from its inception because of inflammatory publicity initiated by the Attorney General and by the

inclusion of petitioner's name on a list of persons the Attorney General desired to deport (Par. XI-XII) (R 7-8).

It was further alleged that Sections 1251 (a) (11) and Sections 1251 (d) 8 U. S. Code were retroactive in effect and violative of the ex post facto clause of the Constitution; that petitioner's offense was not a ground for deportation in 1938 when convicted and upon being made such ground, he was excluded from the effect of the statute; that he had been caught unawares and had not been adequately forewarned of the consequences of his offense by the enactment of the present law (Par XV to XVIII) (R 9-10). Further that the action of the special inquiry officer in refusing a hearing to petitioner on his application for suspension of deportation was illegal, arbitrary and capricious (Par. XX R-11). The petitioner prayed for discharge of petitioner (R-12).

Respondent in his return produced the full record of the deportation proceedings and contended petitioner was properly found deportable and that the deportation hearing was conducted in accordance with the constitution, laws and regulations of the United States (R 15-16).

The writ was issued (R-14) and a hearing held June 5, 1953, when the matter was taken under advisement by the Court (R-17). On June 8, 1953, validity of the deportation order was upheld and the writ discharged (R-25). Written reasons for the decision were given by the Court (R 19-24) and the release of petitioner on $10,000.00 bail was ordered in the event of an appeal from the Order of the District Court (R-24). Notice of appeal was filed June 8, 1953, and petitioner is now at liberty under the bail as fixed by the

Court (R 26-27-28). The lower Court in its reasons for judgment did not consider or pass upon the denial of the application for suspension of deportation.

The Court of Appeals affirmed on May 6, 1954, holding that while the procedure prescribed by Section 1252(b) 8 U. S. C. clearly was not in accord with Section 5(c) of the Administrative Procedure Act, the requirements of the latter Act were inapplicable to deportation proceedings as the procedure set forth in 1252(b) prevailed (R 37-40). It was further held *Sung v. McGrath*, 339 U. S. 33 was no longer applicable and that *Rubinstein vs. Brownell*, 206 F (2d) 449, affirmed 346 U. S. 929 had no application. Although the record shows no denial by the respondent of the existence of the Attorney General's proscribed list of aliens and of the presence of petitioner's name on the list, that the recent decision in *Accardi v. Shaughnessey*, 347 U. S. 260, was not inconsistent with the Court's holding that petitioner's case had not been prejudged by reason of such list and prejudicial publicity initiated by the Attorney General (R 44-45-48).

It was further held that deportation acts are not subject to the constitutional prohibition against ex post facto laws on the authority of *Harisiades v. Shaughnessey*, 342 U. S. 580, 594 and cases cited (R-46).

It was further decided that the Board of Immigration Appeals properly exercised its discretion in determining that petitioner was not entitled to a suspension of deportation (R-47). Further, that in reaching its conclusion, the Board could consider offenses of which petitioner had been pardoned and even an offense in which the Court of Ap-

peals itself had reversed the conviction of petitioner and ordered him acquitted (R-47).

## REASONS FOR ALLOWANCE OF WRIT

1. The questions presented have obvious importance in the administration of the Immigration and Nationality Act of 1952 (8 USC 1101 et seq) which have not been, but should be, settled by this Court.

2. The decision of the Court of Appeals that deportation hearings pursuant to Section 1252(b) 8 USC meet the currently prevailing standards of fairness and impartiality required in the Fifth Amendment is in conflict with the decision of this Court in *Wong Yong Sung vs. McGrath,* 339 U. S. 33.

3. The decision of the Court of Appeals that deportation proceedings pursuant to Section 1252 (b) 8 U.S.C. are not amenable to the provisions of the Administrative Procedure Act is in conflict with the decision of this Court in *Sung vs. McGrath, supra,* and *Rubinstein vs. Brownell,* D. C. Cir. 206, Fed. 2d 449, affirmed 346 U. S. 929.

4. The decision of the Court of Appeals that the case of petitioner was not prejudiced before or prejudged by the special inquiry officer and the Board of Immigration Appeals, by unfavorable publicity instigated by and the actions of the

Attorney General before any hearing is in conflict with the decision of this Court in U. S. ex rel *Accardi vs. Shaughnessey*, 347 U. S. 260.

## SUMMARY OF ARGUMENT

1. Section 1252(b) 8 USC (66 Stat. 208) fails to meet the currently prevailing standards of fairness and impartiality required by the Due Process Clause of the Fifth Amendment in that (1) Investigative and prosecuting functions of the special inquiry officer are commingled with his adjudicative functions and (2) the special inquiry officer is responsible to the supervision of the Attorney General, officers, agents and employees of the service all engaged in the enforcement of the Immigration laws.

It has been held that "when the Constitution requires a hearing, it requires a fair one, one before a tribunal, which meets at least currently prevailing standards of impartiality" *Wong Yong Sung vs. McGrath* (1950) 339 U. S. 33; *Kwong Hai Chew vs. Colding* (1953), 344 U. S. 590. The currently prevailing standards of fairness and impartiality in deportation hearings are found in the Administrative Procedure Act, 60 Stat. 237, 5 USC 1001 et seq. and particularly in Sec. 5(c) 60 Stat. 237, 240, 5 USC 1004(c), *Sung vs. McGrath, supra.*

Section 1252(b) U.S.C. provides that the special inquiry officers functions are to present and receive evidence, interrogate, examine and cross examine the alien or witnesses. By regulation (8 C.F.R., 253 (d)) it may even become his duty to lodge an additional charge against the alien and

proceed to hear his own accusation. In such case, he is accuser, prosecutor and judge.

This was the practice so universally criticised and finally condemned in *Sung vs. McGrath*. Section 1252(b) attempts to avoid constitutional jeopardy by providing that the special inquiry officer is prohibited from conducting any case in which he participated in investigative and prosecuting functions, except as provided in the subsection. With these exceptions, it is obvious the so-called prohibition is one in name only and of no legal or practical effect.

The special inquiry officer is by law (Section 1001(b)(4) 8 U.S.C.; 66 Stat. 166) subject to the supervision of the Attorney General. By regulation, 8 C.F.R. 242: 51 he is subject to the immediate supervision of the district director, also an enforcement officer with investigative and prosecuting functions in immigration cases. Both the law and the regulation are in direct conflict with section 1004(c) 5 U. S. Code providing that no hearing officer shall be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. Here, the supervision and control of the special inquiry officer is not a presumption or assumption, but a mandate of the Act itself.

In the instant case, the supervision of the Attorney General of the special inquiry officer becomes a serious and vital question. On the arrest of petitioner, before any hearing, the Attorney General in the press, both in Washington and New Orleans, initiated prejudicial and unfavorable publicity concerning petitioner and his case. (Exhibit 7,

Hearing Feb. 16, 1953). There is, likewise, the charge in the habeas corpus petition that (Par. XII R. 8) that the name of petitioner appeared on the Attorney General's list of undesirable aliens he desired to deport, the same list at issue in the case of *Accardi v. Shaughnessey*, 347 U. S. 260.

Further, we find in the legislative history of the 1952, no discussion of the supervision of the inquiry officer by his superior officers, including the Attorney General, except the positive statements of both sponsors of the legislation that the "Sung case will be the law of the land when this Code is adopted (98 Cong. Rec. Per. Ed 4416) and "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now." (98 Cong Re. Per Ed. 5778, May 22, 1952).

It is petitioner's contention, therefore, that section 1252 (b) 8 U.S.C. fails to meet the currently prevailing standards for a fair and impartial hearing as required by the Fifth Amendment to the Constitution of the United States.

2. Administrative hearings in deportation cases must conform to the procedural requirements of the Administrative Procedure Act. *Sung vs. McGrath*, 339 U. S. 33. After that decision, Congress passed a rider to the Supplemental Appropriations Act, 1951, 64 Stat. 1048, providing "that proceeding under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C. sec. 1004, 1006, 1008)". This rider or exemption has now been specifically repealed by the 1952 Immigration Act, 66 Stat. 279, 280, Sec. 403 (47) Immigration and Nationality Act of 1952. So the situation in administrative

hearings in deportation cases is the same as existed in 1950 when *Sung v. McGrath* was decided, namely, that deportation hearings are amenable to the procedural requirements of the Administrative Procedure Act. It will be contended that certain detailed provisions in section 1252(b) 8 U.S.C. have been substituted for the comparable provisions of the Administrative Procedure Act. However, a full consideration of the legislative history of the 1952 act will show that Congress had no such legislative intent. It was insisted by the sponsors that the Administrative Procedure Act applied to the bill. Senator McCarran stated on May 22, 1952, (a day later than his previous discussion of 1252 (b)): "The bill provides for Administrative Procedures and makes the Administrative Procedure Act applicable insofar as the administration of the bill is concerned." (98 Cong Rec. Per Ed 5779).

3. The deportation hearing given petitioner was unfair because there was absent elements deemed essential to due process as pointed out heretofore. The Court of Appeals held (R 43) the defects complained of must be such as to lead to a denial of justice. The Court did not consider the alternative infirmity found in the cited cases namely that an element deemed essential to due process be absent. Here we have a hearing officer subject to enforcement officers of the same agency and acting as investigator, prosecutor and judge, all contrary to the accepted standards for a fair hearing.

4. Sections 1251(a)(11) and Section 1251(d) 8 U.S.C., 66 Stat. 204 are retroactive in effect and violate the ex post facto Clause of the Constitution of the United States (Art. I, Sec. 9, Clause 3). Petitioner was convicted of a viola-

tion of the Marihuana Tax Act, Section 2591, 26 U.S.C. in 1938. At that time, such conviction was not a ground for deportation and was only made a deportable offense by the Act of June 28, 1940, 54 Stat. 673. However, this Act specifically exempted convictions for marihuana offenses prior to June 28, 1940. So in effect, petitioner was granted a congressional pardon. This status continued until December 24, 1952, the effective date of the 1952 Act, when all limitations were removed. Therefore, petitioner was caught completely unawares and suffered consequences for his offense of which he had not been adequately forewarned at the time of the commission of the offense.

5. The issuance of a confidential list of undesirable aliens, including the name of petitioner, by the Attorney General in 1952 and the prejudicial announcement, made by the Attorney General on petitioner's arrest on December 30, 1952, prejudged the case of petitioner before both the special inquiry officer and the Board of Immigration Appeals. The consequent failure of both to exercise their independent discretion is a denial of "due process." *U. S. ex rel Accardi v. Shaughnessey* (1954) 347 U. S. 260.

It was stated by the Court of Appeals that no evidence was in the record of the list or that petitioner's name was on it. The fact that the list existed and that petitioner's name was included was made both before the Board and in the petition of habeas corpus (Par XII R8). The hearing before the Board on May 11, 1953 will show no denial of these facts by the Department of Justice. The return to the writ (R 14-16) does not deny these facts. It will be recalled that in the Accardi case there was an affidavit denying the existence of the list. Here, in two instances, there

has been no such showing. Consequently, petitioner has done all that was required of him to sustain these allegations. Rule 12, Fed. Rules Civil Procedure. Likewise, the statement of the Attorney General on December 30, 1952, was a regular Department of Justice release. It flatly stated petitioner's "conviction is a deportable offense" under the new Act. It referred his arrest as "another step in the Attorney General's program for — deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities."

Could any subordinate hearing officer or Board be expected to thwart the orders of their superior?

## ARGUMENT

### I

### SECTION 1252(b) 8 USC, 66 STAT 208 FAILS TO MEET THE CURRENTLY PREVAILING STANDARDS OF FAIRNESS AND IMPARTIALITY REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Section 1252(b) 8 USC, 66 Stat. 208 fails to meet the currently prevailing standards of fairness and impartiality required by the Due Process Clause of the Fifth Amendment in that:

(a) Investigative and prosecutive functions of the special inquiry officer are commingled with his adjudicative functions.

(b) The special inquiry officer is responsible to the supervision of the Attorney General, officers, agents, and employees of the service, all of whom are engaged in the enforcement of immigration laws.

The Fifth Amendment to the Constitution of the United States provides in part, as follows:

> "No person shall be deprived of life, liberty or property without due process of law."

Petitioner is an alien who was admitted for permanent residence in 1910. He may not be deprived of his right to remain in this Country until his deportability is established by law. The Japanese Immigrant Case 189 U. S. 86, 100-101; *Wong Yang Sung v. McGrath*, 339 U. S., 33, 49-50; *Kwong Hai Chew v. Colding*, 344 U. S., 590, 598.

The test to be met in determining the constitutionality vel non of this statute was established by the Supreme Court in the Wong Yang Sung v. McGrath case, supra, and cited with approval in the Kwong Hai Chew case, supra as follows:

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal, which meets at least currently prevailing standards of impartiality." A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional

> standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

See *Galvan v. Press*, decided May 24, 1954, where this Court held "In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process."

It is our contention that the currently prevailing standards of fairness in deportation hearings are to be found in the applicable provisions of the Administrative Procedure Act. It is our further contention, as will be later discussed, that the provisions of Section 1252(b) must conform to the Administrative Procedure Act, but, if not subject to that Act, then 1252(b) violates the Due Process Clause of the Fifth Amendment since the Administrative Procedure Act establishes the "currently accepted standards of fairness and impartiality" required in hearings.

The Court of Appeals decision admits "Clearly the procedure prescribed by 242 (b) does not accord with section 5(c) of the Administrative Procedure Act — — — " (R 37). It has already been shown in the summary of the argument that 1252(b) provides the same commingling of functions as was condemned in *Sung v. McGrath*. The Administrative Procedure Act did not require a complete separation of investigating and prosecuting functions from adjudicating functions. The safeguards the Act sets up were intended to ameliorate the evils from the commingling of functions as set up in Section 1252(b) of the 1952 Act.

"This commingling if objectionable anywhere, would seem to be particularly so in the deportation proceedings. — —".

I (b)

The 1952 Immigration Act by its terms makes the special inquiry officer responsible to the supervision of the Attorney General, officers, agents, and employees engaged in investigative and prosecuting functions for the agency. This enactment strikes at the heart of a fair and impartial hearing and violates the essentials of due process required by the Constitution.

Section 1101 (b) (4) Title 8, United States Code provides as follows:

> "(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this act, as the Attorney General shall prescribe."

Section 1004 (c), Title 5, United States Code provides in part as follows:

> " —nor shall such officer be responsible to or subject to supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency."

The very first requirement of a special inquiry officer is that he shall be *"any immigration officer."*

It must, therefore, be assumed that such officer has in the past or is now performing investigative and enforcement duties relating to immigration or naturalization. Such are the common duties of immigration officers. Such is their normal training, especially if in the service for any particular length of time.

The test for a fair and impartial hearing in accordance with the generally accepted standards as set out in Section 5 (c) of the Administrative Procedure Act (5 USC 1004 (c)) is that hearing officers be removed from the supervision of officers performing prosecuting and investigative functions.

No standards of ability or competence is required by the act. The appointment of special inquiry officers is left to the whim of the Attorney General. Hearing officers enjoy no independence of status. Under the law they must be immigration officers. They are civil service officers and are subject to the normal powers of the Attorney General, as head of the Department of Justice, to appoint, compensate, rate, promote, and remove them.

The special inquiry officer is subject to the immediate supervision of the district director of the Immigration and Naturalization Service in administrative arrangements at the local level. By 8 CFR 242.51, the district director is given the power to assign deportation cases to the special inquiry officer for hearing. The district director is an enforcement officer with investigative and prosecuting functions.

In the instant case, common fairness demands that the special inquiry officer be divorced from the supervision of officers who are enforcement officers.

There has been wide-spread national prejudicial publicity given to the deportation of the petitioner. It has been demanded by Senate investigating committees, nationally syndicated columnists, and by the local press. It has been even demanded by the Attorney General in office at the time of his arrest, who announced in a special press release that the arrest of appellant was a part of a campaign to rid the country of undesirable alien criminals. This special press release also gave at length the alleged criminal record and activities of appellant. (Exhibit No. 7, Hearing Feb. 16, 1953). In fact, the press has stressed that certain portions of the present law were specially passed to deport appellant. Surely, in such circumstances the trial officer must be far removed from the supervision of enforcement officers.

The report of the President's Commission on Immigration and Naturalization, January 1, 1953, at page 162, succinctly points out the danger of such a situation, and says:

> "Under such an arrangement the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers, whose sphere of action encompasses enforcement duties."

It is submitted that under the terms of the 1952 Act and the Regulations promulgated thereunder, the special inquiry officer designated to hold the hearing was subject to the immediate control and supervision of enforcement officers of his service, exercising investigative and prosecuting functions in the agency. Further than that, he is subject, by the very terms of the Act, to the supervision and control of the highest officer engaged in such functions, the Attorney General.

Such procedures violate the basic and fundamental concepts of a fair and impartial hearing contemplated and required by the Constitution and laws of the United States. Thus petitioner was denied the rudimentary requirements of due process and elementary fairness.

## II

## ADMINISTRATIVE HEARINGS IN DEPORTATION CASES MUST CONFORM TO THE PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

The Court of Appeals held that "to the extent the proceedings prescribed by Section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter act are inapplicable to the deportation proceedings." (R 40). The Court also suggested that proceedings under

242(b) were exempted from the purview of the Administrative Procedure Act by reason of Section 7(a) (5 U.S.C. 1006(a)) of that act exempting "specified classes of proceedings — specially provided for or designated pursuant to statute."

Neither holding is tenable after the history of deportation hearings is studied.

The Sung case held squarely that administrative hearings in deportation proceedings were amenable to the Administrative Procedure Act and not exempted therefrom. After the decision a rider to the appropriation Act of 1951, (64 Stat. 1048) exempted deportation proceedings from the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act. This rider or exemption was specifically repealed by Section 403 (47) of the 1952 Act 66 Stat. 279-280. Section 242(b) or Section 1252(b) 8 USC states that it is "the sole and exclusive procedure for determining the deportability of an alien under this section." Let us now look at the legislative history of this section.

Senator Pat McCarran, co-sponsor of this legislation, addressed the Senate at length on the procedural requirements of the Act. See Bestermann's Commentary on the Act, 8 USCA 48, 49, 50. In that statement, it is admitted that the dual-examiner provisions of the Administrative Procedure Act are not complied with. Seeking to explain away the repeal of the rider, it is said (p. 49-50): "That exemption now has been repealed, but it is believed that the above quoted statement made by Senator McCarran fully reflects congressional intent regarding those procedural provisions

of the Act which are designated to provide a substitute for the comparable provisions of the Administrative Procedure Act (S USC Sec. 1001 et seq).

But did Senator McCarran regard such provisions as a substitute for the Administrative Procedure Act? We think not. Nor do we think Congress had that intent after hearing the sponsors of the legislation.

On May 22, 1952, the day after the discussed statement, the Senator said in debate on the bill:

> "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now - - -" (96 Cong. Rec. Per Ed 5778).

And the same day, May 22, 1952, in discussing the rider and section 1252(b), Senator McCarran stated:

> "I will say that the rider referred to was attached to the appropriation bill because the statement was made before the Appropriations Committee that it would cost a considerable sum of money to apply the Administrative Procedure Act to immigration matters. I discussed the subject at length yesterday. I will touch on it just a little if I may at this time. The bill would set aside the rider which was attached to the appropriation bill. *The bill provides for Administrative procedures and makes the Administrative Procedure Act applicable insofar as the Administration of the bill is concerned.*" (Emphasis supplied). (98 Cong Rec. Per Ed p 5779).

And in the House Representative Walter — co-sponsor of the bill, stated:

> " - - - I am sure that if the gentleman will look at Page 163, Paragraph 46, he will find that the law as it was before the House adopted the amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted." (Cong Rec Per Ed p 4416.)

Furthermore, the applicability of the Administrative Procedure Act to the present Immigration law has been confirmed by the Courts. In the case of *Rubinstein vs. Brownell*, 206 F. 2d 449 (June 11, 1953) the Court of Appeals, District of Columbia, reviews at length the historical background of the Act (p 452-455 inc.). In granting Rubinstein an injunction enjoining the Attorney General from arresting him pending a deportation hearing the Court decided the provisions of the Administrative Procedure Act where applicable to the 1952 Act citing the statement of Senator McCarran just quoted. (See 206 F 2d 455). This case was affirmed by Supreme Court January 11, 1954, by an equally divided Court, 346 US 929.

We would, therefore, submit that from the express repeal of the appropriation rider (64 Stat. 1048) by Section 403 (47) of the 1952 Immigration Act and by the positive statements of both of the sponsors of the bill that the provisions of the Administrative Procedure Act are "made applicable to the bill" and that "The Administrative Procedure Act prevails now."

The Administrative Procedure Act demands a separation of functions in hearing officers and freedom from control or supervision of enforcement officers of the same agency. The 1952 Immigration Act does not require either.

Cases upholding the dual capacity of a hearing officer, will be cited such as *US ex Harisiades v. Shaughnessey*, 342 U. S. 580; *Belizaro v. Zimmerman*, 3 Cir. 200 F. 2d 282; *Reynolds v. Dean*, 7 Cir. 68 F. 2d 346; *Palmer v. Ultimo*, 7 Cir. 69 F. 2d 1. An examination of these cases will show that they were decided before the enactment of the Administrative Procedure Act or while the exemption or rider was in effect. The Harisiades case shows the alien consented to such hearing. Here petitioner objected at the outset and only proceeded subject to that objection. (Hearing Feb. 16, 1953).

We submit the principles decided in the Sung case prevail and are now the "law of the land."

## III

## THE DEPORTATION HEARING GIVEN PETITIONER WAS UNFAIR BECAUSE THERE WERE ABSENT ELEMENTS DEEMED ESSENTIAL TO DUE PROCESS

The Court of Appeals decided (R 43) that the defects complained of must be such as to lead to a denial of justice. As authority for this holding, it cited seven cases in foot note 17. An examination of these cases will show that a hearing is also unfair if there is absent one of the elements deemed essential to due process. Petitioner is not com-

plaining because the rules of evidence or of judicial procedure were not adhered to. He claims that by failure to observe the currently prevailing standards for a fair hearing he has been deprived of due process of law. The violations of due process have already been pointed out. The elements deemed essential to due process have been shown to be absent. To paraphrase the language in the Accardi case, supra, it is not charged that the Attorney General ordered the special inquiry officer and the Board to deport petitioner. "It would be naive to expect such a heavy handed way of doing things." However it is charged that the statute places the special inquiry officer and the Board under the supervision of the Attorney General. It is further charged that where the Attorney General has initiated prejudicial publicity concerning the case of petitioner before any hearing and has indicated that he desires the deportation of petitioner as a person on his list of proscribed aliens, the consequence will be that "the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers, whose sphere of action encompasses enforcement duties."

## IV

SECTIONS 1251(a)(11) AND SECTION 1251(d) 8 USC 66 STAT 204, ARE RETROACTIVE IN EFFECT AND VIOLATE THE EX POST FACTO CLAUSE OF THE CONSTITUTION OF THE UNITED STATES (ARTICLE 1, SECTION 9, CLAUSE 3)

This contention has been covered in the summary of the argument. This Court has recently decided the case of *Gal-*

*van v. Press,* May 24, 1954, holding that the ex post facto Clause is inapplicable to deportation proceedings. This case is different in that Congress for twelve years granted legislative immunity from deportation to petitioner.

The harshness of these retroactive provisions have been recognized by Congress and there is now pending before that body amendments placing a ten year limitation on such convictions. (Sec. 342(b)(3) HR 6820; S2585. P 94).

V

THE ISSUANCE OF A CONFIDENTIAL LIST OF UNDESIRABLE ALIENS, INCLUDING THE NAME OF PETITIONER, BY THE ATTORNEY GENERAL IN 1952, and PREJUDICIAL PUBLICITY, AT THE TIME OF PETITIONER'S ARREST, BY THE ATTORNEY GENERAL PREJUDGED PETITIONER'S CASE BEFORE THE SPECIAL INQUIRY OFFICER AND THE BOARD OF IMMIGRATION APPEALS.

It is our contention that the issuance and circulation by the Attorney General of a proscribed list of aliens to be deported and the press release by the same officer before any hearings had the effect of dictating the decisions of the hearing officer and the Board. The consequent failure of both to exercise their independent discretion is a denial of due process. *Accardi v. Shaughnessey* (1954) 347 US 260.

It has already been shown that there was no denial of the existence of the list and the inclusion of petitioner's name thereon. The failure of the respondent to deny the

allegation of the petition for habeas corpus (Par. XII R8) admits as true the allegation and dispenses with the necessity of proof by petitioner.

The press release by the Attorney General on December 30, 1952 is in the record as Exhibit No. 7. Hearing, Feb. 16, 1953. The Court of Appeals, although holding that an adherence to the rules of evidence is not required in deportation proceedings (R 43) attempts to invoke stringent rules of evidence with regard to the Attorney General's statement. There is no denial the Attorney General issued the statement. It was released simultaneously in Washington and New Orleans. The Court of Appeals states the clippings do not constitute evidence of the facts stated therein. The answer to this is that some of the facts stated therein are not true in fact and therefore are all the more detrimental to petitioner. The special inquiry officer had an opportunity to read them and while the articles may not be proof of the facts stated therein, they were available to the hearing officer. The press release stated in part:

> "Attorney General James P. McGranery announced today that Carlos Marcello of Miami, Fla., and Jefferson Parish, La., has been arrested on a deportation warrant by the Immigration and Naturalization Service."
>
> "The arrest in New Orleans was the first major deportation move undertaken since the Immigration and Nationality Act became effective Dec. 24, 1952. The action was another step in the attorney general's program for a denaturalization and/or

deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities."

"Marcello born Feb. 6, 1910, in Tunis, Africa, entered the United States for permanent residence Oct. 7, 1910, at New Orleans. He allegedly is engaged in large slot-machine operations and other activities in Louisiana."

"The deportation warrant was based on his conviction in 1938 for a violation of the marijuana act."

"Such a conviction is a deportable offense under the new Immigration and Nationality Act. The action follows lengthy investigation by both the Federal Bureau of Investigation and the Immigration and Naturalization Service. His conviction under the marijuana act was one of only two in his checkered career . . . "

The prejudicial effect of this publicity is obvious. The language of the release dove-tailed with the list of undesirable aliens to be deported when it stated: "The action was another step in the attorney general's program - - - for deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities." A further reading of the release will show clearly that it was intended to prejudice petitioner. It shows the deportation warrant was based upon a 1938 conviction. With this fact, why is mention made of persons "who are engaged in racketeering or other criminal activities" or is "allegedly engaged in large slot machine operations - - - "? These are

not deportable offenses, if true, and in no way remotely relate to the matter upon which the warrant was based. Further the article says: "Such a conviction is a deportable offense under the new Immigration and Naturalization Act." According to the Attorney General, the case of petitioner was settled and cut and dried at the time of his arrest. There can be no doubt of the damaging and prejudicial effect of the release on the hearing officer and the Board. This was not the "heavy handed way of doing things" but the practical and effective way.

The effect of the Attorney General's interest in the case of petitioner is further reflected by the unusual rapidity of decision. The hearing officer announced his findings in four days; the Board in twenty-two days, much prompter than the ordinary procedure.

The force of the publicity engendered by the Attorney General's statement and actions is further demonstrated by the reasons given by the Board for denying discretionary relief to petitioner. These reasons are found in the Board's decision (Appendix B p. XXXIII). They include the marijuana conviction, which could not be considered, a conviction before 1938 of which he was pardoned, and strangest of all, newspaper clippings rehashing the wild and reckless statements of the Kefauver Committee, calling him a "racketeer" "number one mobster in Louisiana" as evidence not of bad reputation but of bad character. Even the exercise of his constitutional privilege against self-incrimination which was justified by the Court of Appeals (196 F 2d. 437) is used to his prejudice.

As was said in the Accardi case, supra, "public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General planned to deport."

The contention has been made that there has been a change in the office of Attorney General since the issuance of the list and the press release. It is a matter of common knowledge that the campaign instigated by the former Attorney General has been vigorously pursued by his successor. The New York Times of April 27, 1953, comments on this fact in an article headed "Deportation Drive Now Focused on 38 — Racketeer and Red 'Big Shots' Head List as Brownell Spurs Action of Predecessor."

We submit that the prejudice engendered by the issuance and circulation of the undesirable alien list and the press release amounted to the dictation and prejudgment of the decisions in the case of petitioners and this deprived him of due process under the law and regulations.

## CONCLUSION

For the reasons stated herein, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

WHEREFORE, your petitioner prays that a writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said

Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that the petitioner may be granted such other and further relief as to this Court may seem proper.

Dated June , 1954.

Carlos Marcello
Petitioner

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Of Counsel

# APPENDIX "A"

## OPINION UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT

No. 14718

CARLOS MARCELLO,

Appellant,

versus

EDWARD J. AHRENS, Officer in Charge, United States Immigration and Naturalization Service,

Appellee.

*Appeal from the United States District Court for the Eastern District of Louisiana.*

(May 6, 1954.)

Before BORAH and RUSSELL, Circuit Judges, and DAWKINS, District Judge.

RUSSELL, Circuit Judge: Carlos Marcello, a resident alien, was arrested and taken into custody by the United States Immigration Inspector at New Orleans, Louisiana, on December 30, 1952, under a warrant issued pursuant to section 242[1] of the Immigration and Nationality Act of

[1] 66 Stat. 208, 8 U. S. C. A. 1252(a).

1952.[2] The warrant charged specifically that Marcello was subject to be deported under section 241(a)(11) of the Act[3] for the reasons set forth in the margin.[4] Pending a hearing, which was three times continued, the alien was released under bond. The hearing was held at New Orleans on February 16, 1953, at which time the alien interposed objections to further proceedings on constitutional grounds. During the course of the hearing the special inquiry officer advised the alien, through his counsel, of his right to apply for a suspension of deportation,[5] which application must be made during the hearing, according to applicable regulations.[6] Counsel stated that the alien did not wish to apply for such relief. The decision and order of the special inquiry officer, rendered February 20th, held that Marcello was deportable for the reasons stated in the warrant and ordered that he be deported from the United States in the manner provided by law.

After rendition of the decision and order of deportation, the alien filed a motion to reopen the hearing to permit him to apply for discretionary relief by suspension of deportation. This motion was denied by the special inquiry officer on the ground that "the motion failed to state any new facts to be proved at the reopened hearing." In argument before

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[2] 66 Stat. 166, 8 U. S. C. A. 1101, et seq.

[3] 8 U. S. C. A. 1251(a)(11).

[4] "The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

"The Immigration and Nationality Act of 1952 in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marijuana, to wit: The Marijuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress."

[5] 8 U. S. C. A. 1254(a)(5).

[6] 8 C. F. R. 242.54(d).

the Board of Immigration Appeals the alien renewed his claim of deprivation of constitutional process and in addition urged that his motion to reopen the hearing should be granted, "unless the Government is prepared to waive that technical objection and permit the application for suspension to be considered by the Board."

The Board of Immigration Appeals overruled the alien's objections to the proceedings before the special inquiry officer and his attacks against the constitutionality of such proceedings, but accepted his proposal to consider his application for discretionary relief on the record made before the hearing officer. It conceded arguendo that the alien could establish an " 'exceptional and extremely unusual hardship' case" and his "good moral character" and that

he would be able to establish all of the requirements essential to the invocation of its discretion,[7] but, for reasons[8] stated in its decision, the Board declined to grant such relief. The appeal was dismissed.

On June 2, 1953, the alien petitioned the district court for the writ of habeas corpus. The writ was issued and on June 5, 1953, a hearing was held at which time the alien

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[7]Footnote 5, supra.

[8]"As against any evidence that he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana, (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, 'number one mobster in Louisiana,' etc.; and his refusal to testify before the Kefauver Committee.

"With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate subcommittee. He had refused to answer 166 questions on the ground that the answers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered. (Marcello v. United States, 5 Cir., 196 F. 2d 437). In *Mahler v. Eby, supra*, (264 U. S. 32), at p. 42, the Supreme Court, in discussing the question of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that 'the Attorney General *may, in his discretion*, suspend deportation * * *'. It is our considered opinion that the respondent's case is not one which merits the discretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal."

offered in evidence the official record of the Immigration and Naturalization Service containing the full record of his deportation proceedings and rested without offering further evidence in support of the allegations of his petition. The district court, in an able memorandum opinion,[9] held the deportation order valid and accordingly entered judgment discharging the writ. From the order of dismissal, Marcello has taken this appeal.

There is no question but that under section 241(a)(11), *supra,* Marcello is subject to deportation. He does not deny that in October, 1938, he was convicted, on his plea of guilty to an indictment containing two counts, of violating the Marihuana Tax Act of 1937.[10] However, it is contended that the district court erred in discharging the writ of habeas corpus on the ground that section 242(b), *supra*, is violative of the Fifth Amendment to the Constitution of the United States in that it fails to meet the currently accepted standards for a fair and impartial hearing because: (1) investigative and prosecutive functions of the special inquiry officer are commingled with his adjudicative functions and (2) such officer is amenable to the supervision of the At-

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[9]Reported at 113 Fed. Supp. 22.

[10]The appellant was given a general sentence of one year and one day imprisonment. He contends that since he was given a general sentence there was but one conviction, although the indictment related to two distinct transactions, therefore, the finding of the special inquiry officer that he was deportable on two grounds was unwarranted and prejudicial to him. He further submits that there is no valid law of the United States relating to "the illicit traffic in narcotic drugs", thus he could not have been, and was not, convicted of such an offense. Inasmuch as he was convicted of the "violation of (a) law or regulation governing or controlling the taxing", et cetera, of marihuana, which is a deportable offense under the statute, as charged in the warrant, admitted at the hearing and found by the hearing officer, we deem it unnecessary to this opinion to resolve these issues.

torney General whose responsibility it is to enforce the deportation statutes. He argues that sections 241(a)(11) and 241(d) of the Act, which authorize deportation for offenses committed prior to the effective date of the Act are unconstitutional as *ex post facto* laws in that they imposed an additional punishment for an act greater than the law annexed to the crime when it was committed. Finally, he contends that he was entitled to a hearing on his application for discretionary relief which was denied him.

As we understand appellant's argument, he urges that the proceedings prescribed by section 242(b) are subject to, but not in conformity with, the Administrative Procedure Act,[11] or, if not subject to the requirements of that Act, then section 242(b) is violative of the Due Process Clause of the Fifth Amendment, since the Administrative Procedure Act establishes the "currently accepted standards of fairness and impartiality" necessary to constitute due process of law in administrative hearings. Clearly the procedure prescribed by section 242(b) does not accord with section 5(c)[12] of the Administrative Procedure Act, and we shall consider first the contention that in all respects the requirements of the Administrative Procedure Act are controlling.

It is not necessary for decision in this case to consider the broad proposition of whether deportation proceedings are subject to requirements of the Administrative Procedure Act[13] as concerns matters not expressly provided by

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[11] 5 U. S. C. A. 1001, et seq.
[12] 5 U. S. C. A. 1004(c).
[13] See Sung v. McGrath, 339 U. S. 33; Rubinstein v. Brownell, D. C. Cir., 206 F. 2d 449, affirmed by an equally divided court, 346 U. S. 929.

the Immigration Statute. Our investigation is limited to a determination of whether the proceedings provided for by section 242(b), which were followed in this case, are invalid because contrary to that Act. Prior to the enactment of the Immigration and Nationality Act of 1952, there was no express provision in the immigration law requiring that a hearing be granted a deportee. Such matters were left largely to be administered under regulations promulgated by the Attorney General. However, under the decisions of the Supreme Court,[14] the requirement for a fair hearing was necessarily implicit in the deportation statutes and such hearing was required to conform to the Administrative Procedure Act. Following the decision of the Supreme Court in the Sung case, Congress, by a rider to the supplemental appropriations bill enacted in September, 1950,[15] exempted "Proceedings under law relating to the exclusion or expulsion of aliens" from the provisions of sections 5, 7 and 8 of the Administrative Procedure Act. This rider was repealed by the Immigration and Nationality Act of 1952, which specifically prescribed the procedure to be followed in deportation cases in section 242(b) thereof with a further provision that:

> "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

able to the requirements of the Administrative Procedure

pl[illegible]ant relies upon the decision in the Sung case to support his contention that deportation proceedings are amen-

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[14]Notably The Japanese Immigrant case, 189 U. S. 86, 101, and Sung v. McGrath, supra.

[15]64 Stat. 1048.

Act. However, at the time Sung was ordered deported Congress had prescribed no procedure to govern deportation proceedings. In the absence of such legislation the Supreme Court held that the hearing to which Sung was entitled under its prior decisions must conform to the Administrative Procedure Act. Since that time Congress has provided a "sole and exclusive" procedure for determining the deportability of an alien, and therefore, the Sung case is no longer applicable. The case of *Rubinstein v. Brownell*, footnote 13, *supra*, has no application here. It holds merely that a deportation order issued pursuant to the Immigration and Nationality Act of 1952 is subject to judicial review under section 10 of the Administrative Procedure Act.

In view of the plain language of the Immigration Statute, it is difficult to follow appellant's argument that the Administrative Procedure Act has the effect of nullifying the subsequent Act of Congress. He admits that section 242(b) reveals "an unmistakable attempt by Congress to exempt immigration proceedings" from the Administrative Procedure Act, but contends that it has failed to do so. The force of appellant's argument is that by some means the Administrative Procedure Act has the standing of a Constitutional Amendment and Congress is powerless to provide for administrative hearings which do not conform to it. Of course, there is no validity to such an argument.

Section 7(a) of the Administrative Procedure Act, 5 U. S. C. A. 1006 (a), exempts from the purview of that Act "specified classes of proceedings . . . specially provided for by or designated pursuant to statute." We are persuaded that this exemption is applicable to hearings held under section 242(b). Furthermore, and controlling here, even in the

absence of such provision, it was within the power of Congress to exempt such proceedings as those under review from the requirements of its creature, the Administrative Procedure Act. It is fundamental that a prior statute must yield to a subsequent valid act of Congress, insofar as the statutes are repugnant. We hold, therefore, that to the extent the proceedings prescribed by section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings.

It is beyond question that an alien has no absolute right to remain in the United States. Congress has plenary power over aliens and may deport them from this country at any time for any reason, even on grounds nonexistent at the time of their entry. "Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry." *Carlson v. Landon*, 342 U. S. 524, 536. Permissible grounds of deportation of aliens is a matter, where not controlled by treaty, alone for Congressional determination, and controlled only by legislative considerations of international polity and comity. This power of deportation, as stated in a masterly discussion by Mr. Justice Jackson in delivering the opinion of the Court, is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades v. Shaughnessy*, 342 U. S. 580, 587 and see note 14, p. 588. As to the grounds or causes for deportation, the courts are not empowered to substitute their opinion for that of Congress and can properly determine only whether the existence of any prescribed ground of deportation has been fairly established. Thus an alien is not without rights for the due

process clause of the Fifth Amendment is available protection for alien and citizen alike. A resident alien, subject to expulsion and deportation under conditions which Congress may prescribe, may not be deprived of his constitutional right to procedural due process. *Chew v. Colding*, 344 U. S. 590. This includes the right to a fair hearing "before a tribunal which meets at least currently prevailing standards of impartiality." *Sung v. McGrath, supra.* Appellant insists, however, that the procedure provided for in section 242(b) falls short of the current conception of fairness and impartiality and in operation constitutes a deprivation of procedural due process for the reasons above indicated.

With respect to the contention that deportation proceedings must be measured by and equated to the Administrative Procedure Act we think it sufficient to say that we agree with the district court that the Administrative Procedure Act is not the sole criterion of due process of law. In reference to that Act, the Supreme Court, in *United States v. Morton Salt Company*, 338 U. S. 632, 644, observed that "It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights." While that case is not directly in point, we think that the observation is applicable here.

The reference which we have made to the "prosecutive" functions of the special inquiry officer[16] relate to his duties

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[16] "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this chapter to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this chapter, as the Attorney General shall prescribe." 8 U. S. C. A. sec. 1101(b)(4).

which partake of the nature of prosecution. Under the terms of the statute it is his duty to conduct the proceedings, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, to make determinations, including orders of deportation. No special inquiry officer is authorized to conduct a proceeding in any case in which he has participated in investigative functions, or except to the extent stated above, in prosecuting functions. Thus, a special inquiry officer is prohibited from sitting as arbitor in a case which he was responsible for investigating and his prosecutive functions are restricted to those enumerated. Furthermore, as additional assurance that the alien shall be accorded a fair hearing, determination of deportability in each case can rest only upon the record made before the special inquiry officer and shall not then be valid unless it is based upon reasonable, substantial and probative evidence. In addition to these safeguards, the alien must be given notice of the nature of the charges against him and the time and place where the proceedings are to be held; a reasonable opportunity to be present and to be represented by counsel; an opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government.

A hearing in a deportation proceeding is not unfair merely because the rules of evidence and procedure applicable to judicial hearings are not adhered to. To render such a hearing unfair the defects complained of must be such as

to lead to a denial of justice. We find no such defect here.[17] Appellant does not deny that the requirements of the statute were complied with. He contends merely that under the prescribed procedure the administrative or executive officers are in a position to abuse their discretion or to be wrongfully influenced by matters outside the record. It is the deprivation of due process of law which is prohibited by the Fifth Amendment, not the opportunity to abuse due process. We are not at liberty to assume that the officers who are entrusted with the duty of administering the law will violate their trust or their statutory duty. In the event of such breach of duty, the alien will be fully protected by judicial process. See *Accardi v. Shaughnessy*, decided March 15, 1954, . . . . . U. S. . . . .

In his petition, appellant urged that on the day of his arrest the Attorney General announced in a public statement that "your petitioner was an undesirable citizen (sic) and had been guilty of many crimes, and that the proceedings were specially designed to deport petitioner" and that such publicity "was bound to have great effect upon the special inquiry officer." It was also alleged that "the petitioner is further informed and believes that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that your petitioner's name was included on this list." These allegations were made in support of appellant's claim that he was prejudiced by reason of the special inquiry officer being subject to the su-

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[17]United States ex rel Harisiades v. Shaughnessy, 187 F. 2d 137, 141, and cases cited, affirmed 342 U. S. 580; Belizaro v. Zimmerman, 3 Cir., 200 F. 2d 282; Kieleman v. Crossman, 5 Cir., 103 F. 2d 292; Hays v. Hatges, 8 Cir., 94 F. 2d 67; Hays v. Zabariades, 8 Cir., 90 F. 2d 3; Reynolds v. Dean, 7 Cir., 68 F. 2d 346; Palmer v. Ultimo, 7 Cir., 69 F. 2d 1.

pervision of the Attorney General and was thereby deprived of a fair hearing. Although given an opportunity to do so, appellant made no attempt to substantiate these allegations. There is no evidence in the record that the Attorney General prepared a list of aliens whom he desired to deport or, of course, that appellant's name was among those listed. Likewise, the record is silent as to the alleged statement made by the Attorney General, except for six newspaper clippings which were exhibits at the deportation hearing in some of which the statement attributed to the Attorney General was reported. These clippings evidence only that there was unfavorable publicity concerning appellant's arrest and do not constitute evidence of the facts stated therein. Nevertheless, assuming that the Attorney General did make such a statement, in this case it could hardly be said to have prejudiced appellant or to have influenced the special inquiry officer's determination of deportability. This is not a case where closely contested factual issues were presented for determination. Appellant admitted that in 1938 he was convicted of violating the Marihuana Tax Act of 1937, therefore, his deportability under section 241 (a)(11) was established as a matter of law.

The contention that the provisions of section 241[18] are unconstitutional, null and void because they are *ex post*

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[18]Section 241(a)(11), 8 U. S. C. A. 1251(a)(11), provides that any alien who "is, or hereafter at any time after entry has been . . . convicted," et cetera, shall be deported upon order of the Attorney General. Section 241(d), 8 U. S. C. A. 1251(d), provides that with exceptions not pertinent here the provisions of the statute are applicable to all aliens belonging to any of classes enumerated in subsection (a) notwithstanding "(1) that such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

*facto* laws, violative of the provisions of Article 1, Section 9, Clause 3 of the Constitution of the United States, requires little discussion. It is too well established to admit of controversy that acts of Congress governing deportation are not subject to the constitutional prohibition against the passage of *ex post facto* laws.[19] Appellant suggests that the Supreme Court, given another opportunity to review its prior decisions, might reach a different result. However, those decisions are binding upon us and, even if were disposed to do so, which we are not, we have no power to overrule them.

This leaves for consideration appellant's contention that he was arbitrarily denied a hearing on his application for a suspension of deportation. The district court did not expressly rule on this issue, however, it is properly before us for decision. We have hereinbefore related the circumstances under which this application was belatedly filed, denied by the special inquiry officer and renewed before the Board of Immigration Appeals. Aside from the fact that the application was not timely filed, see *McKenzie v. Savoretti*, 5 Cir., 200 F. 2d. 546, by expressing his willingness to have the application considered by the Board without re-opening the hearing, appellant waived his objections to the overruling of his motions to reopen the hearing. Furthermore, upon considering the application as having been made before it, the Board viewed it as though appellant could have proved all of the facts alleged therein and treated

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[19]Harisiades vs. Shaughnessy, 342 U. S. 580, 594; United States ex rel Shaughnessy, 338 U. S. 521, 529; Mahler v. Eby, 264 U. S. 32; Bugajewitz v. Adams, 228 U. S. 585. See also Carlson v. Landon, 342 U. S. 524.

it for all purposes as a valid application for discretionary relief.

Appellant, apparently recognizing that he is hard pressed to show that he was prejudiced by the ruling of the special inquiry officer in view of his waiver, urges that the reasons given by the Board for denying discretionary relief are unsound. It is noted that this point was not raised by the petition in the trial court and that it is not even alleged here that the Board abused its discretion or failed to exercise it. *Caddeo v. McGranery*, D. C. Cir., 202 F. 2d. 807. The Board did not take "it upon themselves to decide that the appellant could not establish good character", as stated by appellant. Upon his express waiver of further hearing, the Board, considering the facts disclosed by the record, exercised its discretion and determined that the order of deportation should not be suspended.

It was not improper for the Board to consider appellant's prior convictions, his numerous arrests and his refusal to give testimony before a Senate Investigating Committee in the exercise of its discretion to deny his application. Although only three of his arrests resulted in convictions and, upon a holding that he was not criminally liable for refusing to testify before the Senate Committee, one of these was reversed[20] and he received a full pardon from another, the Board was not precluded from considering these factors in reaching its conclusion.

It is urged by appellant that this court should consider the recent decision of the Supreme Court in *Accardi v.*

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[20]Marcello v. United States, 5 Cir., 196 F. 2d. 437.

*Shaughnessy, supra*, in arriving at a decision in this case. We find nothing in that opinion inconsistent with what we have held here. The court there held that when a measure of discretion is delegated to a subordinate officer or board, a petition alleging that such discretion was not exercised, or that the decision of such body was dictated by a higher authority, states a cause for relief and the petitioner is entitled to a hearing on that issue. In the present case appellant was given an opportunity to establish the allegations of his petition and made no effort to do so. In this situation he cannot be heard to complain.

The judgment of the district court is affirmed.

JUDGEMENT AFFIRMED.

A True copy:
Teste:

(SEAL)

(s) OAKLEY F. DODD
Clerk of the United States Court
of Appeals for the Fifth Circuit.

APPENDIX "B"

OPINION BOARD OF
IMMIGRATION APPEALS

JUN 1 — 1953

A-2669541—Miami

CARLOS MARCELLO or CALOGERO MINACARI

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

William C. Orchard, Esquire
204 Queen and Crescent Building,
New Orleans, Louisiana
and
Jack Wasserman, Esquire
Warner Building,
Washington, D. C.
(Heard May 11, 1953)

IN BEHALF OF SERVICE:

Sidney B. Rawitz, and Hyman Scher, Service Representatives
(Heard May 11, 1953)

CHARGES:

Warrant: Act of 1952—Convicted of violation of law relating to illicit traffic in narcotic drugs—Section 241 (a)(11)

Act of 1952—Convicted of violations of law governing taxing, etc., of marihuana — Section 241(a)(11)

Lodged: None

APPLICATION: Termination of proceedings or reopening of hearing

DETENTION STATUS: Released under bond

This case is before us on appeal from a decision of a Special Inquiry Officer dated February 20, 1953, directing the respondent's deportation.

The respondent is a 43-year-old male, native of Tunisia and apparently of Italian nationality, who has resided in the United States since October 7, 1910. He last entered during 1936 or 1937 after a visit of a few hours in Mexico. On October 29, 1938, he was sentenced to imprisonment for a term of one year and one day following his conviction on a plea of guilty to an indictment containing two counts. The first count charged that on or about December 6, 1937, he feloniously transferred to another individual a quantity of marihuana, which transfer was not made pursuant to a written order on the required form, in violation of the Act of August 2, 1937 (26 U. S. C. 2591). Count two charged a similar unlawful transfer of marihuana on or about December 15, 1937.

By brief and at the oral argument, counsel raised a number of contentions. They assert that the hearing was unfair

because of adverse newspaper publicity resulting from a press release of former Attorney General McGranery at the time the immigration warrant of arrest was served and because members of the press were permitted to be present during the hearing before the Special Inquiry Officer. Counsel do not argue that there is any prohibition, either in the statute or in the regulations, against deportation hearings being open to the public, and we do not believe that either of the factors mentioned resulted in the preclusion of a fair hearing to the respondent. This is particularly so with respect to the issue of deportability in this case since there is no dispute as to the facts.

Another contention of counsel is that the hearing was void because of asserted failure to comply with the Administrative Procedure Act. They rely on Section 403(a)(47) of the Immigration and Nationality Act which repealed the provision of law exempting the Immigration and Naturalization Service from compliance with Sections 5, 7 and 8 of the Administrative Procedure Act. We have carefully considered the argument which was advanced and the excerpts from the speeches of Senator McCarran and Congressman Walter to which counsel referred. We believe that the following statement appearing in the Conference Report[1] is illuminating:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of

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[1]U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, p. 1754.

> economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

We think that the foregoing makes it abundantly clear that it was not intended that deportation proceedings should be subject to the specific provisions of the Administrative Procedure Act, but rather that the procedural requirements, laid down in Section 242(b) of the Immigration and Nationality Act, were considered by Congress to be within the pattern of the Administrative Procedure Act and to meet the standards of that Act. We doubt that Congress could have expressed this more clearly than it did by the use of the following language in Section 242(b): "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this Section." We hold that the procedure which was followed in the respondent's case was entirely in accord with that specified in Section 242(b) of the Immigration and Nationality Act and regulations made pursuant thereto, and that counsel's contention relating to the Administrative Procedure Act must be rejected.

Counsel also contend that the proceeding violates the due process and ex post facto provisions of the Constitution. It is true that the respondent committed the narcotic offense in December 1937 and that, when the word "marihuana" was added to the Act of February 18, 1931 by Section 21 of the Alien Registration Act of 1940, specific provision was made that no alien should be deportable by reason of such amendment for an act committed prior thereto. However, we con-

sider the situation as being no different from that existing in *Mahler v. Eby*, 264 U. S. 32 (1924). In that case, the aliens were convicted in 1918 and their deportation was sought under the Act of May 10, 1920. It was there contended that the Act of May 10, 1920 was an ex post facto law, because the offense had been committed prior to its enactment, and that the proceedings were without due process of law. These contentions were rejected, the Court stating that the inhibition against the passage of an ex post facto law applied only to criminal laws. The same contentions were again rejected in *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952). Hence, we find this contention of counsel to be without merit.

It is also argued by the respondent's counsel that Section 241(a)(11) of the Immigration and Nationality Act, under which the Service contends the respondent is deportable, cannot be given a retroactive application. We agree that the savings clause contained in Section 405(a) of the Immigration and Nationality Act is very broad. Yet counsel has not cited any specific language in that Section on which they desire to place reliance. Our examination of Section 405(a) does not disclose any specific provision particularly applicable to the respondent's case, and we believe that the phrase therein reading, "unless otherwise specifically provided," defeats his claim because Section 241(d) does, in fact, specifically provide as follows:

> Except as otherwise specifically provided in this Section, the provisions of this Section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior

> to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

For the proposition that Section 241(a)(11) cannot be given a retroactive application, counsel also argue that this paragraph distinguishes between narcotic offenses and marihuana offenses; that both charges cannot be sustained; that, if any charge can be sustained, it is the marihuana charge; and that there is no specific provision in the clause dealing with marihuana which would make it retroactive. We have been unable to find, in counsel's briefs or oral argument, any elaboration of their view that both charges cannot be sustained. We find no repugnance in these two charges. Section 241(a)(11) authorizes the deportation of an alien "* * * who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing * * * of * * * marihuana, * * *."

The only difference in the two clauses quoted above, insofar as the question of whether they are retroactive is concerned, is that in the first clause appears the words "at any time" and these words do not appear in the second clause. Since the clause relating to narcotic drug addicts, which precedes the clauses quoted above, is prospective in operation, it is possible that the words "at any time" were inserted in the next clause to emphasize that it was retrospective, and that it was not considered necessary to again use this phrase in the last clause. The respondent's one conviction is within the purview of both clauses quoted above, that is,

*he has been convicted* of a violation of a law relating to the illicit traffic in narcotic drugs and *he has been convicted* of a violation of a law controlling the taxing of marihuana. In view of the foregoing, we conclude that the respondent is deportable on the two charges contained in the warrant of arrest.

Counsel also contend that, before a valid order of deportation can be entered, it is necessary that the place of deportation be designated. We must reject this contention on the basis of our decision in *Matter of R*, Int. Dec. 411, decided December 4, 1952, approved by Attorney General December 29, 1952.

The remaining question relates to the respondent's motion to reopen the proceeding to permit the filing of an application for suspension of deportation, which motion was denied by the Special Inquiry Officer. At the oral argument, the Service Representative contended that, because of the respondent's incarceration in a federal penitentiary from November 1938 to August 1939, he cannot meet the requirements of Section 244(a)(5) of the Immigration and Nationality Act.[2]

The pertinent portion of Section 244(a)(5) is as follows:

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[2]It might be argued that the words "assumption of a status" in Section 244(a)(5) should be construed, in the respondent's case, to mean the date when he assumed the status of a deportable alien, that is, on December 24, 1952 when the Immigration and Nationality Act became effective, and that he cannot prove physical presence and good moral character for ten years thereafter. The Service has not urged this interpretation, and we deem it unnecessary to discuss such an obviously strained construction.

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation * * * in the case of an alien who— * * * (5) is deportable under paragraph * * * (11) * * * of section 241(a) for an act committed or status acquired subsequent to such entry into the United States * * *; has been physically present in the United States for a continuous period of *not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation*, and proves that during all of such period he has been and is a person of good moral character; * * *. (Italics supplied)

The Service, relying primarily on the word "immediately", contends that the italicized portion means that an applicant for suspension of deportation under paragraph (5) must establish physical presence and good moral character during a period of ten years *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation. Applying this contention to the respondent's case, it is claimed that, by the use of the word "immediately," the 10-year-period during which the requirements mentioned must be established commenced on December 6 or 15, 1937 (the dates when the offenses were committed) if we depend on the words "commission of an act," or on October 29, 1938 (the date of conviction) if we rely on the phrase "assumption of a status." Since it was not the commission of the offense, but the conviction, which constitutes a ground for deportation, we may disregard the dates December 6 or 15, 1937. The Service is contending that the respondent must establish

good moral character from October 1938 to October 1948 and that, since he was in prison from November 1938 to August 1939, he is precluded from meeting this requirement because of the provision contained in Section 101(f)(7) which is to the effect that no person shall be regarded as of good moral character if he has been confined to a penal institution for 180 days or more during the period for which good moral character is required.

Taking into consideration the phrase in Section 244(a)(5) reading, "during all of such period he has been and is a person of good moral character," we find that, if we were to adopt the construction urged by the Service, it would be tantamount to saying that the respondent must establish that he is now a person of good moral character and that he was a person of good moral character from 1938 to 1948 but that it is immaterial whether he was physically present in the United States or of good moral character from 1949 to 1952. In the case of an alien who became deportable in 1925, it would mean that he would have to prove physical presence and good moral character from 1925 to 1935 and that he need not prove such requirements from 1935 to 1952. Since there is an obvious ambiguity concerning the period during which such an applicant must establish physical presence and good moral character, we must construe the statute to give effect to the intention of Congress.

It is well settled that a case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning,[3] and that a statute should be

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[3] *Stewart v. Kahn*, 78 U. S. 493, 504 (1870).

construed so as to carry out the intent of the legislature, although such construction may seem contrary to the letter of the statute[4]. In addition, Section 244(a)(5) was specifically made applicable to persons deportable on criminal ground by the inclusion of paragraph (4) of Section 241(a), which paragraph relates solely to aliens convicted of crimes involving moral turpitude. Hence, Congress must have intended that reformed criminals should be in a position to apply for suspension of deportation. Yet, since almost all aliens of this class would probably be confined for over 180 days after becoming deportable, the effect of adopting the construction urged by the Service would be to virtually eliminate the possibility that a reformed criminal could ever apply for suspension under paragraph (5), regardless of whether twenty or thirty years had elapsed since he was released from prison and regardless of his complete rehabilitation since that time. Other rules of statutory construction, which are pertinent to our consideration, are that a law will not be strictly read if such reading would result "in the emasculation or deletion of a provision which a less literal reading would preserve"[5] and that a remedial statute should be construed liberally to carry out the purposes of its enactment.[6]

In determining the construction which should be placed on the statutory provision under consideration, we note that paragraph (1) of Section 244(a) requires physical presence and good moral character for "not less than seven

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[4]*Wilkinson v. Leland*, 27 U. S. 627, 662 (1829); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892); *Ozawa v. United States*, 260 U. S. 178, 194 (1922).
[5]*Markham et al. v. Cabell*, 326 U. S. 404, 409 (1945).
[6]*Stewart v. Kahn*, 78 U. S. 493, 504 (1870).

years *immediately* preceding the date of such application;" paragraph (2), "not less than five years *immediately* preceding his application;" paragraph (3), "not less than five years *immediately* following the commission of an act, or the assumption of a status, constituting a ground for deportation;" and paragraph (4), "not less than ten years after such entry and *immediately* preceding his application." In each of these paragraphs, as well as in paragraph (5), the word "immediately" was used in denoting the period during which physical presence and good moral character were to be proved. In paragraphs (1), (2) and (4), where the period is that preceding the application, the word "immediately" was appropriate and necessary to prevent any claim that proof of physical presence and good moral character during some earlier period would be a compliance with the statute. It is readily understandable that the framers of the legislation, having found it incumbent to employ the word "immediately" in three paragraphs, may have inadvertently inserted it in paragraphs (3) and (5) without recognizing that it might result in a construction contrary to the intended scope of this provision.

We have also observed that in both paragraphs (3) and (5), which are the two paragraphs relating to deportability on grounds arising subsequent to entry, the language used was identical with the exception that paragraph (3) specifies five years rather than ten years. In commenting on paragraphs (3) and (5), the following appears in House Report number 1365:[7]

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[7]U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, pp. 1717-1718

> The third category * * * provides for the adjustment of status * * * upon a showing of 5 years' continuous physical presence *immediately* following the commission of an act or the assumption of a status constituting a ground for deportation, good moral character during that period * * * .
>
> The fifth category * * * provides for the adjustment of status * * * upon a showing of 10 years' continuous physical presence after the commission of an act, or the assumption of a status constituting a ground for deportation, good moral character during that period * * * .

The language quoted above is found in identical form at page 25 in Senate Report number 1137 relating to S. 2550. That Congress did not attach any particular significance to the word "immediately" in paragraph (3) and (5) is shown by the fact that in both the Senate and House Reports the word "immediately" was used in the comment on paragraph (3), and in both reports it was omitted with reference to paragraph (5), the specific provision with which we are here concerned.

While it might be argued that Congress was endeavoring to place certain added restrictions on the granting of suspension to persons of the criminal class, we do not think such an argument would be tenable. This would ignore the fact that precisely the same language is used in paragraph (3) which, by its terms, does not apply to persons of the criminal class. Furthermore, if we were to adopt the construction urged by the Service, we would have to apply the same rule under paragraph (3) which would mean that

such an alien would be forever precluded from applying for suspension if, during the first five years after becoming deportable, he committed some act which militated against the establishment of good moral character, but that he would not be barred if the same act or a more serious offense were committed after the expiration of five years.

In analyzing the provisions of paragraphs (2) to (5) inclusive of Section 244(a), we find that paragraphs (2) and (4) require a specified period of physical presence and good moral character immediately preceding the application, and that paragraphs (3) and (5) require such a period following the date that an alien became deportable. Paragraphs (2) and (4) relate to aliens excludable at the time of entry and such an alien would, therefore, be subject to deportation immediately following entry. Hence, the requirement in paragraph (2) of five years' physical presence after the last entry would also constitute a requirement that five years must have elapsed after the date the alien became deportable. The same situation exists with respect to paragraph (4) in which there is a specific statement relating to "ten years *after such entry*." It is clear from the language of paragraphs (3) and (5) that a period of five or ten years must elapse after the date the alien became deportable. However, this requirement could not have been incorporated in paragraphs (3) and (5) merely by requiring proof of physical presence and good moral character for either five or ten years prior to the application, for in that case a person who had been physically present in the United States for five or ten years and who then became deportable could immediately apply for suspension of deportation, assuming that he was also able to establish good moral character.

After carefully reviewing the legislative history and Section 244(a) in its entirety, we believe that in paragraphs (2) to (5) Congress was concerned with two requirements: (a) that physical presence and good moral character must be proved for five or ten years preceding the application and (b) that five or ten years must elapse after the alien became deportable and before he might apply for suspension. It is our considered opinion, therefore, that paragraph (5) must be construed as requiring that, before an application for suspension may be submitted, at least ten years must have elapsed after the grounds for deportation arose, and that during the ten years immediately preceding the application, the alien must prove continuous physical presence in the United States and good moral character. In view of the foregoing, we conclude that the respondent is not barred from applying for suspension of deportation merely because he was confined in a penal institution during the period from November 1938 to August 1939.

As previously indicated, the respondent's motion to reopen the proceedings in order to permit the filing of an application for suspension of deportation was denied by the Special Inquiry Officer. The latter's order indicates that he took this action because he had informed counsel at the hearing that applications for suspension of deportation or voluntary departure might be submitted and counsel declined to apply for either of these forms of relief. (pp 24, 25). Because of the failure to make timely application for suspension of deportation, the record is not as complete as might be desirable. At the oral argument (p. 5), the respondent's counsel stated that he believed that the hearing should be reopened unless the Service was prepared to permit the application for suspension to be considered by us

notwithstanding the fact that no formal application had been made at the hearing. Under the circumstances, we will proceed to a consideration of whether suspension of deportation should be granted in this case.

Counsel is aware that 8 CFR 244.3 permits the consideration of confidential information, under certain circumstances, in connection with the question of whether voluntary departure or suspension of deportation should be granted. However, in the respondent's case, we have no knowledge as to whether the Service has a confidential file and we will consider only the record, consisting of the hearing and exhibits, in reaching a decision.

In the motion to reopen, it was asserted that the respondent first entered the United States at the age of 10 months; that he has been a person of good moral character during the last ten years; and that his deportation would result in exceptional and extremely unusual hardship to the alien, his citizen wife and four minor citizen children. At the hearing, the respondent testified that he is in the real estate business and the coin operated music box business. Counsel did not set forth, in his motion, any facts which would indicate that the respondent's deportation would, in fact, result in exceptional and extremely unusual hardship to the alien or to his wife or his children. We must take cognizance of the fact that both committees, in their reports to Congress on their respective bills (S. 2550 and H. R. 5678), stressed the restrictive purpose of the phrase "exceptional and extremely unusual hardship." The following appears at p. 25 in Senate Report number 1137 on S. 2550, 82nd Congress, 2nd Session, and, with the exception of the last three sen-

tences, is contained in almost identical form in the House Report:[8]

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation, the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien

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[8]House Report number 1365 in U. S. Code Congressional and Administrative News, 82nd Congress, Second Session, Vol. 2, p. 1718.

> would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

While we doubt that the alien could establish that his is an "exceptional and extremely unusual hardship" case and while there may well be some question whether he could establish good moral character, we will assume, for the purpose of this decision, that he would be able to establish all the requirements specified in Section 244(a)(5) of the Immigration and Nationality Act. As against any evidence he might present, there are the record of his conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, "number one mobster in Louisiana," etc.; and his refusal to testify before the Kefauver Committee.

With respect to the latter matter, the respondent was found guilty in the District Court for the Eastern District of Louisiana on six counts of an indictment charging contempt of the United States Senate for refusing to answer certain questions before a Senate subcommittee. He had refused to answer 166 questions on the ground that the an-

swers would tend to incriminate him, but at the trial he was found not guilty on all but six counts relating to six questions. On appeal, his conviction was reversed and a judgment of acquittal was rendered.[9] In *Mahler v. Eby, supra*, at p. 42, the Supreme Court, in discussing the question of what evidence would warrant the finding that an alien was an undesirable resident, clearly indicated that the refusal of an alien to answer questions was an attitude from which it might well be inferred that what would be revealed by the answers would not add to the alien's desirability as a resident. Similarly, we believe that in the respondent's case, although he was acquitted by the appellate court, his refusal to answer questions on the ground that the answers might incriminate him does not indicate that he is a desirable resident. Section 244(a) specifically provides that "the Attorney General *may, in his discretion,* suspend deportation * * * ." It is our considered opinion that the respondent's case is not one which merits the discretionary relief of suspension of deportation and that the order of deportation entered by the Special Inquiry Officer should be approved. We will, therefore, dismiss the appeal.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

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[9]Marcello v. United States, 196 F. 2d 437, CA 5 (1952).

# APPENDIX "C"

## OPINION AND ORDER
## SPECIAL INQUIRY OFFICER

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A2 669 541 New Orleans March 4, 1953

In re: CARLOS MARCELLO, or, Calogero Minacari

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

William C. Orchard, Attorney
204 Queen and Crescent Building
New Orleans, Louisiana

CHARGES:

WARRANT: Immigration and Nationality Act of 1952 —Convicted of the violation of a law relating to the illicit traffic in narcotic drugs;
Immigration and Nationality Act of 1952 —Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana

XXXVI

LODGED: None

APPLICATION: Motion to reopen

DETENTION STATUS: Released under $5,000 bond.

WARRANT OF ARREST SERVED: December 30, 1952.

DISCUSSION: This record relates to a 43-year old married male, a native of Africa, a citizen of Italy, who last entered the United States at Laredo, Texas during 1936 or 1937. Hearing in this matter was conducted at New Orleans, Louisiana February 16, 1953 and on February 20 the alien was ordered deported on the grounds that he had been convicted of the violation of a law relating to the illicit traffic in narcotic drugs and that he had been convicted of the violation of laws governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana. Counsel for the alien has now submitted a motion for the reopening of this proceeding in order to allow the alien to apply for suspension of deportation. This motion will now be considered.

Counsel contends that the alien is eligible for suspension in that more than ten years has elapsed since the commission of the act constituting grounds for deportation; that he has been a person of good moral character during that period; that he first entered this country at the age of ten months and has resided here since that time and that his deportation would result in exceptional and extremely unusual hardship to the alien, his wife, and four minor children. The record of hearing shows clearly that the alien has resided in the United States since 1910, with the exception of a brief visit to Mexico in 1937. The record further

shows that the alien is married to a native-born citizen of the United States and that they have four native born children. No inquiry was made with regard to the alien's character or to any hardship that might result from the alien's deportation as no application for any form of relief was made at the time of the hearing. The following testimony is taken from the hearing record:

Question by Special Inquiry Officer to attorney: "Mr. Orchard, the regulations provide that at any time during the hearing the Special Inquiry Officer may advise the alien and his counsel of any relief for which they make application. At this time I wish to advise you that you may, if you desire, submit in behalf of the respondent an application for suspension of deportation based upon residence in the United States. In this case it would be ten years subsequent to the commission of an act constituting grounds for deportation, provided, of course, that he is able to establish that he has been a person of good moral character during that entire period and that his deportation would result in exceptionally and extremely unusual hardship either to himself or to a citizen or resident alien spouse or child. Further, you may, if you desire, submit in behalf of the respondent an application for the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided that the respondent is able to establish that he has been a person of good moral character for the past five years or longer. Do you understand these various forms of relief?" Answer: "Yes."

Question: "Do you wish to make an application for either or both of these forms of relief?" Answer: "No, Sir." (p.p. 24, 25).

Counsel apparently clearly understood the nature of the relief for which he might apply and he declined to make any application. He has set forth nothing in his motion to indicate any new facts or evidence that were not developed at the time of the hearing. The time to make application for suspension of deportation was during the hearing when the alien and his attorney were advised that such application might be made. The fact that counsel has changed his mind and now wishes to make an application is not sufficient grounds to order the hearing reopened. The motion to reopen will be denied on the grounds that the motion failed to state any new facts to be proved at the reopened hearing.

ORDER: It is ordered that the motion to reopen be denied.

(s) FRED P. McCLESKEY
Fred P. McCleskey
Special Inquiry Officer

FPM: mi

# APPENDIX "D"

## OPINION AND ORDER OF SPECIAL INQUIRY OFFICER

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A2 669 541 New Orleans February 20, 1953

In re: CARLOS MARCELLO, or, Calogero Minacari

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

William C. Orchard, Attorney
204 Queen and Crescent Building
New Orleans, Louisiana

CHARGES:

WARRANT: Immigration and Nationality Act of 1952 —Convicted of the violation of a law relating to the illicit traffic in narcotic drugs;
Immigration and Nationality Act of 1952 —Convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

LODGED: None

APPLICATION: None

DETENTION STATUS: Released under $5,000 bond.

WARRANT OF ARREST SERVED: December 30, 1952.

*DISCUSSION:* This record relates to a 43-year-old married male, born in TUNIS, AFRICA, of Italian parents. While his testimony indicates doubt as to his citizenship, he testified that his mother and father were both born in Italy and that his father was naturalized in the United States about 1942. He appears to have acquired Italian citizenship at the time of birth by virtue of birth to Italian parents. This is substantiated by the fact that he was classified as a citizen of Italy at the time of his original entry into the United States. He originally entered the United States at New Orleans, Louisiana, October 7, 1910, when he was admitted as an immigrant alien. This entry has been verified, (Ex. 3). He last entered at Laredo, Texas, during 1936 or 1937 after a visit to Mexico of one to two hours. He testified that this trip to Mexico is the only time that he has been out of the United States since his original entry in 1910.

Counsel for the Respondent has made numerous objections and has excepted to the rulings of the Special Inquiry Officer. These objections will be discussed at this time before proceeding with the discussion of the charges against the alien.

Counsel objected to the presence of newspaper reporters at the hearing. He pointed out that the Law does not provide for either an open or closed hearing and contends that it is not customary for the press to be present at deportation hearings. While the Immigration and Nationality Act makes no provisions for either open or closed deportation hearings, Section 236(a) of the Act provides for the conduct of exclusion hearings "separate and apart from the public." The omission of this wording in the section pertaining to deportation hearings would indicate that the Act does not contemplate that these hearings will be closed proceedings. Counsel's objection was overruled, and the newspapermen were permitted to be present throughout the proceeding.

Counsel objected to the entire proceedings on the ground that Section 242(b) of the Immigration and Nationality Act is unconstitutional, null and void in that it does not meet the requirements or standards for a fair and impartial hearing and is violative of the provisions of the Administrative Procedures Act. In support of this objection he has submitted a brief wherein he sets forth at length the reasons for his objection, (Ex. 8). Counsel in his brief points out that the Supreme Court in the case of *Wong Yang Sung v. McGrath (Feb. 20 and Mar. 13, 1950, 339 U. S. 33, 908)* held that deportation proceedings against the alien were amenable to the Administrative Procedures Act. He further points out that Congress on September 27, 1950, negated this Supreme Court decision by exempting exclusion or expulsion of aliens from the provisions of the Administrative Procedures Act. Further, that this Act has now been specifically repealed by the Immigration and Nationality Act of 1952. He contends that Section 242(b)

of the Act does not meet the requirements for fairness and impartiality required by the Constitution and Laws of the United States because the investigative and prosecuting functions of the Special Inquiry Officer are commingled with his adjudicative functions and, further, the Special Inquiry Officer is responsible to the supervision of officers and employees of the Service engaged in the performance of investigative and/or prosecutive functions for the agency. Section 242 of the Immigration and Nationality Act provides for the apprehension and deportation of aliens. Paragraph (b) of that Section provides that a Special Inquiry Officer shall conduct proceedings under this Section to determine the deportability of any alien. It provides that determination of deportability in any case shall be made only upon a record made in a proceeding before a Special Inquiry Officer at which the alien shall have reasonable opportunity to be present. It provides that proceedings before a Special Inquiry Officer shall be in accordance with such regulations as the Attorney General shall prescribe and that such regulations shall include requirement that, (1) the alien be given notice reasonable under all the circumstances of the nature of the charges against him and of the time and place at which the proceedings will be held; (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel authorized to practice in such proceedings as he shall choose; (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. All of these requirements have been met. Section 242(b) also provides,

"The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

The provisions of the Administrative Procedures Act does not apply to these procedures. The procedure for determining the deportability of an alien is by law vested in the Immigration Service and that procedure is the sole and exclusive procedure for determining deportability. 8 CFR 9.1(b) reads, "The designation and appointment of Special Inquiry Officer. The Commissioner may designate, elect, and appoint as a Special Inquiry Officer any Immigration officer whom he deems specially qualified to exercise the powers and perform the duties of a Special Inquiry Officer as set forth in the Immigration and Nationality Act and this chapter. The Commissioner shall issue to each officer so appointed a certificate under his signature bearing a seal of the Service, such certificate shall state and shall be accepted in any proceedings as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration and Nationality Act and in this chapter." The attorney attempted to examine the Special Inquiry Officer and has objected to the refusal of the Special Inquiry Officer to allow himself to be placed under examination. The certificate of designation of Special Inquiry Officer signed by the Commissioner was presented to the attorney for his examination. Regulations provide *"such certificate shall state and shall be accepted in any proceeding as evidence that the officer to whom the certificate is issued has the authority to exercise the powers and perform the duties of a Special Inquiry Officer as provided in the Immigration*

*and Nationality Act and in this chapter.*" The Special Inquiry Officer is not required by law or regulations to submit himself to questioning by any attorney who wishes to challenge his designation as an Inquiry Officer. He is only required to submit a certificate issued by the Commissioner and bearing the seal of the Service to show that he has been designated and appointed as a Special Inquiry Officer. The record shows that the attorney did examine the certificate and was aware of the fact that the Special Inquiry Officer presiding at this hearing had been duly designated and appointed. Counsel further points out that the Special Inquiry Officer in conducting proceedings under the Immigration and Nationality Act is required to present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, as well as lodging and developing additional charges against the alien. He contends that this is prosecuting and investigative functions. It might be pointed out that in the instant case, an Examining Officer was assigned. Counsel also contends that the Special Inquiry Officer is unable to conduct a fair and impartial hearing because he is subject to the supervision of the Attorney General. He contends that the Inquiry Officer has been unduly influenced by newspaper articles released by the Attorney General and Immigration officials. Most of these objections made by the attorney were raised in the *Matter of D-A5 390 614 (Int. Dec. 339) (June 18, 1951) (December 26, 1951.)* The attorney in that case objected to the Hearing Examiner because prior to his appointment the Hearing Examiner had for fourteen years or more served in various positions in the Service which included functions in an investigative, prosecutive, and supervisory capacity. The Board held, "Granted that this is so, however, we fail to see why it should be cause for disqualification. If

counsel's line of argument were pursued to a logical conclusion, no prosecuting attorney could ever be permitted to serve as a judge on the theory that having once engaged in prosecutive functions such a person would be unable to conduct a fair and impartial hearing as a judicial officer." The Board pointed out that the important point was whether or not the Hearing Examiner had at any time in the past acted in an investigative or prosecutive capacity in that particular case. In the instant case, the Special Inquiry Officer was not asked the question as to whether or not he might have acted in an investigative or prosecutive capacity in this case. Had that question been asked, the answer would have been "no". The attorney in the *D——— matter*, supra, contended that the Hearing Examiner, although appointed under the Administrative Procedures Act, was subject to the Loyalty Act and was bound to be under pressure in order to protect his employment. The Board ruled, "To accept this argument as valid would be tantamount to declaring that Government employees are so pervaded with fear and so intimidated that they are incapable of passing a fair and honest judgment in any matter involving a subversive issue." While the instant case does not involve a subversive issue, the inference has been made that the Special Inquiry Officer being responsible to the Attorney General would not be capable of passing a fair and honest judgment in the case. There is no basis for counsel's contention and no restrictions are placed upon the Special Inquiry Officer in his conduct of hearings other than that they be conducted in accordance with the Law and the regulations promulgated thereunder. Certainly the Attorney General expects these hearings to be conducted in accordance with the highest standards of fairness and impartiality and that the decision rendered by the Special Inquiry Of-

ficer be rendered strictly in accordance with the evidence presented at the hearing.

Counsel has objected to this proceeding on the ground that Section 241(a)(11) of the Immigration and Nationality Act is unconstitutional, null and void, being ex post facto law violative of Article 1, Section 9, Clause 3 of the Constitution of the United States. This issue has been well settled by the Supreme Court in numerous decisions. In one of the leading cases, the Court stated, "However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the ex post facto provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades v. Shaughnessy 342 U. S. 580, 72 S. Ct. 512 (1952)* and cases cited therein. Counsel also cites the Harisiades case in his brief in support of his objection to this proceeding but states that they do not fall within the same category. He contends that the Respondent was caught unaware by the change in the Law and was not adequately forewarned of the consequences of his prohibitive acts. Certainly, the alien must have been aware of the possibility of criminal prosecution at the time that he committed these acts. The Supreme Court did not say that their decision in the Harisiades matter would have been other than the one rendered if the alien had not been adequately forewarned that his conduct was prohibitive and forewarned of its consequences. They merely pointed out that in that case he was adequately forewarned. The Supreme

Court in the Harisiades case stated, "It is contended that this policy allows no escape by reformation. We are urged to apply some doctrine of atonement and redemption. Congress might well have done so, but it is not for the judiciary to usurp the function of granting absolution or pardon. We can not do so for deportable ex-convicts, even though they have served a term of imprisonment calculated to bring about their reformation." Subsequent to the rendering of that opinion the Immigration and Nationality Act became effective. Section 244 (a) (5) of that Act provides that the Attorney General may in his discretion suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence in the case of an alien who is deportable under various criminal grounds for an act committed or status acquired subsequent to entry into the United States, provided the alien has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act constituting a ground for deportation and has been a person of good moral character during all that period of time. The Act also provided that an alien who fell within that category might be granted the privilege of voluntary departure from the United States at his own expense in lieu of deportation, provided, he had been a person of good moral character for five years immediately preceding his application for voluntary departure. The Respondent and his attorney were advised of this form of relief and declined to make application, (p. 25).

Counsel requested a postponement of any further action in this proceeding in order to give him an opportunity to request judicial review in accordance with Section 10 of the Administrative Procedures Act. This motion was denied

on the ground that Section 242 of the Immigration and Nationality Act sets forth the procedure determining deportability of an alien and that the procedure so prescribed is the sole and exclusive procedure for determining the deportability of an alien. The Law is certainly clear in this regard, and there appears to be no reason for any further discussion of this particular issue.

Respondent's final objection was to the warrant of arrest on the ground that the warrant contains two offenses where there has been only one conviction. The warrant of arrest was issued pursuant to Section 241(a)(11) of the Immigration and Nationality Act.

> "Section 241(a). Any alien in the United States (including alien crewmen) shall upon the order of the Attorney General be deported who—
>
> (11) is or hereafter at any time after entry has been, a narcotic drug addict, or who has at any time been convicted of a violation of any law or regulations relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulations governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, cocoa leaves, heroin, marihuana, any sort of derivative, or preparation of opium

or cocoa leaves or isonipecaine, or any addiction forming or addiction sustaining opium."

The charges in the warrant of arrest are that he has been "convicted of the violation of a law relating to the illicit traffic in narcotic drugs," and "convicted of a violation of the law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana." Both of these charges are contained in paragraph 11. They both stem from a conviction under the Marihuana Act of August 2, 1937. He is not charged with being deportable because of two convictions but he is charged with being deportable on two different deportation charges.

Counsel for the Respondent and the Examining Officer concurred in offering into evidence a record of a sworn statement previously made by the Respondent before an Immigration officer. The Respondent in this statement testified as to his nativity and to his residence in the United States. He also testified with regards to several arrests as shown by a Federal Bureau of Investigation report exhibited to him at that time. He testified that he was arrested by the New Orleans Police Department on March 28, 1938, for narcotic violation and held for Federal authorities, (Ex. 2). The Respondent was questioned during the hearing with regards to this arrest and identified certified court records consisting of certified copies of Indictment, Conviction, and Sentence in the case of CARLOS MARCELLO in the United States District Court, Eastern District of Louisiana, New Orleans Division, on April 25, 1938, as pertaining to him. He further stated that he was convicted and sentenced as shown in the court record, (p. 19, Ex. 4). No objection was made to the introduction of the court record,

and the alien does not deny his conviction and sentence at that time. The Indictment in this matter is for violation of the Marihuana Tax Act of 1937. The first count to the Indictment reads, "That one Carlos Marcello . . . on or about the 6th day of December, 1937, at New Orleans Louisiana . . . did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana, to wit, sixty-three and one-half (63½) ounces of bulk marihuana which said transfer of said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcello on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Act of August 2, 1937." Count 2 reads "Carlos Marcello . . . on or about the 15th day of December, 1937, at New Orleans, Louisiana, and within the jurisdiction of this Court did then and there unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, remedy, derivative, and preparation of marihuana, to wit, three hundred sixteen and one-half (316½) ounces of bulk marihuana which said transfer of said marihuana aforesaid was not made in pursuance of a written order of the said Gilmore Failor to the said Carlos Marcelio on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States as required by Act of August 2, 1937." The Respondent pleaded guilty to these charges in the District Court of the United States, Eastern District, Louisiana Division, on October 29, 1938, and was convicted on his plea of guilty of the offense charged in the Indictment, to wit: "Violation of the Marihuana Tax Act, 1937". He was sentenced to imprisonment for a period of one year and one day, (Ex. 4).

There is no question of the fact that the alien was convicted October 29, 1938, and sentenced to imprisonment for a period of one year and one day for violation of the Marihuana Tax Act of 1937. The only issue is whether or not he is now deportable under the Immigration and Nationality Act of 1952. Section 241(d) of the Act provides,

> "except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts by reason of which any such alien belongs to any of the classes enumerated in subsection (a) occurred prior to the date of enactment of this Act."

The first charge in the warrant of arrest is that the alien has been convicted of a violation of law relating to the illicit traffic in narcotic drugs. Counsel has pointed out that at the time of the alien's conviction for violation of the Marihuana Act of 1937, his conviction was not included among the deportable offenses set out in section 156(a) Title 8 U. S. C.; that on June 28, 1940, Congress amended that section and added convictions of violations of marihuana laws to the other deportable offenses contained therein. Counsel contends that narcotic drugs and marihuana are treated under separate chapters in the Internal Revenue Code and that marihuana has never been made a narcotic by special order of the President of the United States. Chapter 23 of Title 26, Internal Revenue Code, relates to narcotics. Sub-chapter (a) pertains to "opium and cocoa

leaves." Sub-chapter (b) pertains to "opium for smoking." Sub-chapter (c) pertains to "marihuana." Marihuana is treated as a narcotic under the Internal Revenue Code. The Act of February 18, 1931, providing for deportation of aliens convicted for violation of any law regulating traffic in narcotics was amended June 28, 1940, to add marihuana to the list of narcotics contained in that Act. The Respondent has been convicted of the violation of a law that relates to the illicit traffic in narcotic drugs, to wit: Marihuana. Accordingly, he is deportable on the first charge contained in the warrant of arrest.

The second charge in the warrant of arrest is that the alien has been "convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing and giving away of marihuana." The offense stated in the Indictment to which the Respondent pleaded guilty was that he did "unlawfully, knowingly, fraudulently, and feloniously transfer to one Gilmore Failor a certain compound, manufacture, remedy, derivative, and preparation of marihuana." The wording of the Indictment leaves no question of the fact that the alien is clearly deportable on the second charge contained in the warrant of arrest. Both charges in the warrant of arrest are clearly sustained.

The Respondent originally entered the United States in 1910 and with the exception of the one brief visit to Mexico has remained in the United States continuously since that time. He is married to a native born citizen of the United States and has four native born children. He was offered an opportunity to apply for discretionary relief but declined to make application. The record shows that he was arrested in 1929 and charged with "accessory before and after fact,

assault and robbery, Canal Bank, Algiers, Louisiana" — the charges were dismissed. He was arrested in 1930 and charged with assault and robbery, sentenced to nine to fourteen years in the penitentiary. He received a pardon for this offense from the Governor of the State of Louisiana on July 16, 1935. He was arrested in 1935 for a violation of the Internal Revenue Laws and the case was dismissed. He was convicted about August 20, 1951, in the District Court of the United States in New Orleans for contempt of Congress. This conviction was reversed by the Court of Appeals for the 5th Circuit. The Respondent has refused to specify any country to which he should be deported.

*FINDINGS OF FACT:* Upon the basis of all the evidence presented, it is found:

1. That the respondent is an alien, a native of TUNIS, AFRICA, a citizen of Italy;
2. That the respondent entered the United States for permanent residence at New Orleans, Louisiana, October 7, 1910;
3. That the respondent last entered the United States at Laredo, Texas, during 1936 or 1937;
4. That the respondent was convicted in the District Court of the United States, Eastern District of Louisiana Division, on October 29, 1938, on his plea of guilty of the offense of "violation of the Marihuana Tax Act of 1937";
5. That the offense for which the respondent was convicted was a violation of a law relating to the illicit traffic in narcotic drugs;
6. That the offense for which the respondent was convicted was a violation of a law governing and

controlling the taxing, sale, exchange, dispensing, and giving away of marihuana.

*CONCLUSIONS OF LAW:* Upon the basis of the foregoing findings of fact, it is concluded:

1. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law relating to the illicit traffic in narcotic drugs, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress;

2. That under Section 241(a)(11) of the Immigration and Nationality Act of 1952, the respondent is subject to deportation in that he has been convicted of the violation of a law governing and controlling the taxing, sale, exchange, dispensing, and giving away of marihuana, to wit: The Marihuana Act of August 2, 1937, Public Law 238, Chapter 553, 75th Congress.

*ORDER:* It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

(s) FRED P. McCLESKEY
Fred P. McCleskey
Special Inquiry Officer

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IN THE

# Supreme Court of the United States

OCTOBER TERM — 1954

## No. 145

CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

---

**SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM — 1954

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NO. 154

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CARLOS MARCELLO,

Petitioner

versus

EDWARD J. AHRENS,
Officer In Charge
United States Immigration
and Naturalization Service.

(John M. Bonds, Officer in Charge, substituted as Appellee in place and stead of Edward J. Ahrens)

---

# SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner, Carlos Marcello, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, af-

firming a judgment of the United States District Court for the Eastern District of Louisiana discharging a Writ of Habeas Corpus and sustaining the validity of a deportation order issued against petitioner.

Petitioner reiterates all of the matters covered in his original petition filed herein on June 17, 1954.

Because of intervening jurisprudence available to petitioner only after the filing of the original petition herein, there is now filed a supplemental petition and brief under the provisions of Rule 24 (4) of this Court.

## *QUESTION PRESENTED*

Whether the status of petitioner as a non-deportable resident alien both at the time of the enactment of and the effective date of the Immigration and Nationality Act of 1952 (66 Stat 162-283; 8 USC 1101 et seq) was affected by the provisions of that Act, particularly Section 1251 (a) (11) and Section 1251 (d), Title 8 United States Code, 66 Stat 204.

## *STATUTES INVOLVED.*

Act of February 18, 1931, Ch 224, 46 Stat. 1171, read at its enactment as follows:

"Any alien (except an addict who is not a dealer in or peddler of, any of the narcotic drugs mentioned in this Act) who, after February 18, 1931, shall be convicted and sentenced for violation of or con-

spiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, cocoa leaves, heroin, or any salt, derivitive, or preparation of opium or cocoa leaves, shall be taken into custody and deported in manner provided in Sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in the United States."

Act June 28, 1940, Public Law No. 670 Ch. 439, Title II, Section 21, 54 Stat. 673, amending Title 8, Section 155 and 156 (a) (now repealed) read in part as follows:

"Sec. 21. The Act entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics' approved February 18, 1931, is amended — (1) By striking out the words "and sentenced"

. . . . . .

(3) By inserting after the word 'heroin' a comma and the word 'marihuana'.

"Sec. 22. No alien shall be deportable by reason of the amendment made by Section 20 or 21 on account of an act committed prior to the date of the enactment of this Act."

Section 155, 8 US Code provided in part:

> "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter."

Section 403 of the Immigration and Nationality Act of 1952, Paragraph 66 Stat. 279-280, provides in part as follows:

> "(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
>
> (13) Act of February 5, 1917 (39 Stat. 874)"
>
> (31) Act of February 18, 1931 (46 Stat. 1171, 8 USC 156 (a)"

Section 1251 (a) 11, Title 8, U. S. Code (Section 241 (a) (11), Immigration and Nationality Act of 1952 provides in part as follows:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;" (66 Stat. 204)

And Paragraph (d) of the same section reads as follows:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (66 Stat. 204)

Section 405 (a) (Public Law 414, June 27, 1952) of the Immigration and Nationality Act of 1952, 66 Stat. 280 (Note following Section 1101, 8 United States Code, (Savings Clause) in part reads as follows:

> "Sec. 405 (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, (sic) conditions, rights, acts, things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect ***"

## *STATEMENT*

The facts relating to the question presented in this supplemental petition are set out at pages 12 and 13 of the original petition.

The contention that petitioner had the status of a nondeportable resident alien at the time of the enactment of

and the effective date of the 1952 Immigration Act was raised before the special inquiry officer (Original Petition, Appendix D, p XLVI), the Board of Immigration Appeals (Original Petition, Appendix B, p. XX, XXI, XXII) and in the petition for a writ of habeas corpus (R 9-10 Par. XIII, XV, XVI, XVII.)

## *REASON FOR ALLOWANCE OF WRIT*

1. The question presented has obvious importance in the administration of the Immigration and Nationality Act of 1952 (8 USC 1101 et seq) which has not been, but should be, settled by this Court.

## *SUMMARY OF ARGUMENT*

Petitioner had the status of a non-deportable resident alien because of the absence of any statutory provisions under which he could be deported until the enactment of the present Immigration Act of 1952 and this status was preserved to him because it was not the intention of Congress to alter that status and because of the Savings Clause of the 1952 Act (Sec. 405 (a) 8 USC 1101 Note 66 Stat 280).

## *ARGUMENT*

Petitioner was convicted on October 29, 1938 on a plea of guilty to an indictment charging a violation of the Marihuana Tax Act of 1937. At the time of his conviction and sentence, petitioner was not a deportable alien, as there was not then in force any law authorizing his deportation because of such conviction.

When the word "marihuana" was added to the Act of February 18, 1931, 46 Stat. 1171, by Section 21 of the Act of June 28, 1940, 54 Stat. 673, specific provision was made in Section 22 of the 1940 Act that no alien should be deportable by reason of such amendment for any act committed prior thereto. Thus petitioner had the status of a non-deportable resident alien on the enactment of the 1952 Immigration Act June 27, 1952 and upon its effective date, December 24, 1952.

Petitioner, therefore, for a long period of time, conducted himself in the light of that status. He engaged in business and raised a family of four in this country. His reliance on that status was reinforced by the fact that his deportation status during these years was the subject of several investigations by the Immigration Service all with the result, publicly announced in the press, that petitioner was not subject to deportation.

It is, therefore, apparent that over a long period of years, it was not the policy of Congress to make the grounds for deportation of an alien operate retrospectively. It was only upon the general revision of immigration laws by the present Act that such an interpretation was placed upon grounds for deportation occuring prior to the passage of the Act of 1952. And, it is our contention that it was not the intention of Congress to deport a resident alien having the status enjoyed by petitioner.

Section 1251 (a) (11), Title 8, U. S. Code 66 Stat. 204 (Section 241 (a) (11), Immigration and Nationality Act of 1952 provides in part as follows:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

Is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation . . . of . . . marihuana . . . "

And Paragraph (d) of the same section reads as follows:

"Except as otherwise specifically provided in this section, the provision of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." (66 Stat. 204)

There is no doubt that to apply to petitioner the above sections must have a retroactive effect.

It is our contention that because of the absence of any statutory provisions under which petitioner could be deported until the enactment of the present Act that petitioner had the status of a non-deportable resident alien and this status was preserved to him by reason of the Savings Clause of the 1952 Act (Sec. 405 (a), 8 U.S.C. 1101 note).

This Court, in the consideration of petitioner's contention, must bear in mind that the 1952 Act effects a complete revision of the immigration and nationality laws of the nation. Congress certainly was aware that in such a complete revision of the law, there would inevitably be serious, harsh and unforeseen effects upon preexisting statuses and conditions. It may well be that Congress never contemplated the result here reached.

The question of the status of aliens who were convicted and sentenced for violation of laws relating to narcotics, but were saved from deportation by the recommendations of the sentencing judge (See 8 U.S.C. Sec. 155) have already been decided favorably to the aliens in two cases. These cases are *U. S. ex rel De Luca v. O'Rourke*, No. 14, 995, 8th Circuit, decided June 17, 1954, rehearing denied July 14, 1954 and *Ex Parte Robles-Rubio* (1954) D. C. Calif., 119 F. Supp. 610. In these cases, it was decided that as the judicial recommendations were valid when made, they continue to relieve the alien from deportation by virtue of the saving clause (405 (a) of the 1952 Act.)

The reasoning of these cases and their applicability to the instant case will be fully discussed hereafter. However, at this time, we will discuss a question that will at once

arise in the minds of the Court. It will be thought and undoubtedly argued that the cited cases are not applicable because of the judicial recommendations which are not here present. However, we must remember that the aliens in both cases were deportable because of their convictions. Petitioner was not deportable because of the absence of statutory authority to deport. Even after the enactment of the Act of Congress of June 28, 1940 he was not deportable. Petitioner was never in the position where he could appeal to a competent court for a recommendation of no deportation. There was no court to grant him this relief. The law does not require a person to do a vain and useless thing. In this situation can it be said that there is a difference in the status of petitioner and the aliens in the above cases? It might be argued that if it were held there was a difference, then the interpretation of Section 1251 (a) (11) of the Act of 1952 is so discriminatory against petitioner as to be lacking in due process under the Fifth Amendment.

However, what must be determined here is the effect of the new statute upon the status of aliens, who have heretofore been not judicially, but legislatively, saved from deportation in narcotic cases. As was said in *Ex Parte Robles-Rubio*, 119 F. Supp. 610, 613:

> "The *power* of Congress to alter their status and subject them now to deportation is unquestionable. See *United States ex rel Barile v. Murff*, D. C. Md. 1953 116 F. Supp. 163. But, it is the *intent* of Congress in this regard, which we must endeavor to ascertain."

Strange as it seems the question of the retroactive effect of Sections 1251 (a) (11) and 1251 (d) were not extensively discussed in the debates and in the reports on the Act. The House Report says:

> "*Grounds for deportation* relating to aliens convicted of certain offenses set forth in the Act of June 28, 1940 (54 Stat. 673) . . . *are continued in the bill.*" (Emphasis supplied) (1952 Cong. Service Vol. 2 p. 1715)

The language of the house report is important. "Grounds for deportation . . . set forth in the Act of June 28, 1940 (54 Stat. 673) are continued in the bill." This language does not signify any intention by Congress to revoke the status of petitioner, who was non-deportable by the Act of 1940. On the contrary, the exemption of petitioner was recognized when the 1940 Act grounds for deportation "were continued in the bill."

Neither does the language of the co-sponsor of the bill, Representative Walter, where he stated in answer to the objection of the C.I.O. to creating and making retroactive new grounds for deportation thus jeopardizing the status of resident foreign born:

> "*Of course H. R. 5678 does not do that.* The Internal Security Act does and the Internal Security Act is part of the law of the land today. It is restated, that is true, in this bill. That is because we are trying to put together for the first time since 1802 all the statutes relating to immigration and naturalization."

> "It does, however, cover the situation where an alien succeeds in hiding in the United States . . . As those of you who have practiced law know, the statute of limitation does not run when a person hides. The statute is tolled. We carry that philosophy into the statute." (98 Cong. Record (Per. Ed. 1 4301-2)) (Emphasis supplied)

This statement by a legislator of vast experience in immigration matters shows no intent to alter the status of appellant. Petitioner was not a Communist dealt with by the Internal Security Act, nor is there the slightest suggestion that he was an alien "hiding in the United States." On the contrary, he lived openly and publicly, and the record shows that the immigration service had full knowledge not only of his whereabouts but of his comings and goings. "It might well be that the Congress never contemplated this result." *Robles-Rubio*, supra.

It is the accepted principal of law that laws regulating human action are to operate prospectively unless clearly provided otherwise.

In enunciating this principle, Chief Justice Marshall, speaking for the Court, in *Reynolds v. McArthur*, 2 Pet. 417, 434, said:

> " . . . It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable. No words are

found in the Act of 1818 which render this odious construction indispensable."

And, in *Cameron v. United States*, 231 U. S. 710, 720, it was said:

"... A retroactive operation of statutes is not to be given except in clear cases, unequivocably evidencing the legislative intent to that effect."

The broad and comprehensive clause embodied in the 1952 Act, Sec. 405 (a) 66 Stat. 280, 8 U.S.C. 1101 note, reads, as far as pertinent as follows:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of ... ; or to affect any prosecution, suit, action or proceedings, civil or criminal, brought, or any *status*, condition, right in process of acquisition, *act*, thing, liability, obligation, matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, *statutes (statuses?)*, conditions, rights, acts, things, liabilities, obligations, or matters, the statutes, or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in full force and effect." (Emphasis supplied)

This so-called savings clause has been adjudged to be "broad and comprehensive" in *Yanish v. Barber* (1954) 9th Cir. 211 F. (2d) 467, 470, and is further referred to "as a

measure of policy and precaution" and "for this purpose to have continued in force the statutes or parts thereof under which such status, obligation, liability or right became fixed or determined."

Judge Goodman of the District Court (Calif.) in *Ex Parte Robles-Rubio*, 119 F. Supp. 610, at page 613, gives an able and scholarly interpretation of the savings clause and its effect. He states:

> "The saving clause in the 1952 Act is one of unusual breadth as is appropriate in a statute which effects a complete revision of the immigration and nationality laws of the nation. *The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon pre-existing statuses and conditions, and the Congressional desire to avoid such effects as far as possible* . . . In my opinion, this provision was designated to meet just such a situation as is presented here." (Emphasis supplied)

This language of Judge Goodman applies with equal force to the case of petitioner.

In the opinion in the DeLuca case, (set forth in the appendix) decided June 17, 1954, rehearing denied, in discussing the status of an alien saved from deportation on a narcotic conviction by judicial recommendation, Judge Sanborn, as organ of the Court, said:

> "To increase the uncertainty as to whether Congress intended to deprive an alien such as DeLuca

> of the benefit of the recommendations of the sentencing court, we have the so-called savings clause, Section 405 (a) of the Act, 66 Stat. 280 (Note following Section 1101, 8 U.S.C., 1952 Ed. page 734) . . . "

The Court in that case stated it could be argued that by putting aliens convicted of narcotic law violations in a distinct class, Congress intended to deprive all aliens eligible to and who had received judicial recommendations of no deportation, of their non-deportable status. On the other hand, if could be argued that DeLuca came within Section 241 (a) (4) of the Act as to whom the recommendations of no deportation would still be effective. The Court then further held this uncertainty was increased by the broad and comprehensive savings clause of the 1952 Act.

This reasoning likewise applies to the case of the petitioner. It can be argued under a strict and literal interpretation of Section 1251 (a) (11) that petitioner can be deported because of his long-ago conviction in 1938, that his status acquired under the Act of Congress of June 28, 1940 is to be ruthlessly pushed aside and petitioner uprooted from his home, his family and means of livelihood.

It can likewise be contended in view of the House Report that "Grounds for deportation" contained in the 1940 Act "are continued in the bill" means just that, and that the non-deportable status of petitioner granted in the 1940 Act continues in full force and effect. This is particularly true in view of the comprehensive savings clause of the 1952 Act and the logical interpretation placed by Judge Goodman on such clause.

We submit that the conclusion reached by the Court of Appeals for the Eighth Circuit in the *DeLuca* case, supra, is also applicable here. This conclusion was:

> "The record indicates that, since his convictions, De Luca has been a law-abiding resident alien. The disastrous consequences of deportation to him would be so far out of proportion to any benefit the United States could seemingly derive from his removal from the country as to entitle him to have *any reasonable doubts as to his deportability resolved in his favor.* Cf. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10. It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority for depriving DeLuca of the status of a non deportable alien . . . " (Emphasis supplied.)

We submit that the broad and comprehensive provisions of the savings clause of the 1952 Act were "designed to meet just such a situation as is presented here." Furthermore, in the language of the DeLuca case, supra, "it seems apparent that the controlling question . . . can be put at rest only by the Supreme Court . . . "

## *CONCLUSION*

For the reasons stated herein, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

WHEREFORE, your petitioner prays that a writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that the petitioner may be granted such other and further relief as to this Court may seem proper.

Dated August _____, 1954

Carlos Marcello
Petitioner

By: CHARLES W. KEHL
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CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

*APPENDIX*

United States Court of Appeals
For The Eighth Circuit

---

No. 14,995.

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United States ex rel, Giuseppe
(Joseph) DeLuca,
Appellant,

vs.

J. L. O'Rourke, District Director, Immigration and
Naturalization Service, Justice Department,
Appellee.

---

(June 17, 1954.)

---

Appeal from the United States District Court for the
Western District of Missouri.

---

R. T. Brewster (Hunt C. Moore was with him on the brief), for Appellant.

Horace Warren Kimbrell, Assistant United States Attorney (Edward L. Scheufler, United States Attorney, and William O. Russell, Assistant United States Attorney, were with him on the brief), for Appellee.

Before SANBORN, JOHNSEN and COLLET, Circuit Judges.

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SANBORN, Circuit Judge.

Giuseppe (Joseph) DeLuca, an alien in custody under a warrant for deportation issued October 15, 1953, by the Acting District Director, Kansas City District, Immigration and Naturalization Service, Department of Justice, petitioned the District Court for release on habeas corpus. The court issued an order to show cause directed to the respondent, J. L. O'Rourke, District Director, United States Immigration and Naturalization Service, Department of Justice, (appellee). After his response to the order and after a hearing, the court denied and dismissed the petition. DeLuca has appealed.

The order for the deportation of DeLuca, in so far as it was sustained by the Board of Immigration Appeals, was based upon findings of the Special Inquiry Officer of the Immigration and Naturalization Service who conducted the deportation hearing, that DeLuca was an alien who had twice been convicted and sentenced for violating the law relating to the importation and sale of narcotic drugs and who was therefore subject to deportation under Section 241 (a) (11) of the Immigration and Nationality Act, 66 Stat. 163 et seq., effective December 24, 1952, 8 U.S.C., 1952 Ed., §1251 (a) (11). Section 241 (a) (11) provides as follows:

"(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

"(11) is, or hereafter at any time after entry has been a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate."

DeLuca, a sixty-year old alien, had first come to the United States in 1910 from Italy, where he was born, and had last entered the United States in 1934 from Italy as a returning resident. Two judgments of conviction were entered against him on March 27, 1943, in the United States District Court for the Western District of Missouri, one based upon the verdict of a jury finding him guilty under an indictment, based on 21 U.S.C. (1940 Ed.) §174, the "Narcotic Drugs Import and Export Act", charging him and others with the concealment of narcotic drugs, knowing them to have been imported unlawfully into the United States; the other conviction based on his plea of guilty to an indictment under the same statute,[1] charging him and

---

[1]The judgment imposed under the second indictment bore the caption "Criminal indictment in one count for violation of U.S.C., Title 26, Sec. 2553." This was a mistake, since the crime charged in the indictment and described in the judgment was clearly under Section 174 of Title 21 U.S.C.

others with the sale of narcotic drugs, knowing them to have been unlawfully imported into the United States. The District Court sentenced DeLuca to three years imprisonment for each offense, the sentences to be served concurrently.

DeLuca admitted that he was an alien who had been convicted of violations of law relating to the illicit traffic in narcotic drugs. One of his main contentions in the District Court in the habeas corpus proceedings was that, under an agreement with the United States Attorney whereby DeLuca was to forego an appeal from the judgment of conviction entered upon the jury verdict under the first indictment and was to enter a plea of guilty to the second indictment, in consideration of the United States Attorney recommending to the court that DeLuca be given a certain sentence and that the court recommend to the Attorney General that DeLuca be not deported, he had, in effect, acquired the status of a nondeportable alien, the court having accepted the recommendations of the United States Attorney and having recommended to the Attorney General in each of the cases that DeLuca be not deported. DeLuca also contended that to give Section 241 (a) (11) of the Immigration and Nationality Act of 1952 a retrospective effect would be violative of his constitutional rights.

Judge Reeves, who sentenced DeLuca and who also entered the order from which he has now appealed, made timely recommendations, in conformity with Section 155(a) of Title 8 U.S.C. (1940 Ed.), to the Attorney General that DeLuca be not deported because of his convictions upon charges of having violated Section 174 of Title 21 U.S.C. (1940 Ed.).

At the time Judge Reeves, in 1943, imposed sentences upon DeLuca, Section 155(a) of Title 8, U.S.C., 1940 Ed., provided as follows:

"(a) * * * The provisions of this section respecting the deportation of aliens convicted of a crime *involving moral turpitude* shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter; * * * ."

Section 175 of Title 21 U.S.C., 1940 Ed., provided:

"§175. Any alien who at any time after his entry is convicted under section 174 of this title shall upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor be taken into custody and deported in accordance with the provisions of sections 155 and 156 of Title 8 or provisions of law hereafter enacted which are amendatory of or in substitution for such sections."

In the habeas corpus proceeding, Judge Reeves reached the conclusion that his recommendations to the Attorney General that DeLuca be not deported were unauthorized and ineffective because the crimes of which DeLuca was convicted were not crimes involving moral turpitude. But the Judge's recommendations were presumptively valid and there is nothing in the record to show that the crimes

were not of such a character as to involve moral turpitude. We note that in the decision of the Board of Immigration Appeals in this case the following statement appears: "It is conceded that prior to the Immigration and Nationality Act an alien convicted of the offenses in question thereby became deportable, but that a recommendation against deportation was effective to prevent deportation."

While it is no doubt true that there may be technical, inadvertent and insignificant violations of the laws relating to narcotics, which do not involve moral turpitude, there can be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic. The evils which result from unlawfully importing or dealing with unlawfully imported narcotic drugs are a matter of common knowledge. Even the federal laws relating to the domestic traffic in narcotic drugs, which were sustained as revenue measures, were recognized as having a moral purpose as well as that of raising revenue. *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402; *United States* v. *Doremus*, 249 U.S. 86, 94. In *United States v. Balint*, 258 U.S. 250, 253, the court said: "The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs."

In *Jordan v. De George*, 341 U.S. 223, 232, it was held that all crimes in which fraud is an ingredient are crimes involving moral turpitude, and that a conspiracy to defraud the United States of taxes on distilled spirits was such a crime within the meaning of §19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C., 1940 Ed., §155(a), and required the deportation of an alien sentenced

more than once to imprisonment for one year or more because of conviction for crime involving moral turpitude. The crime of dealing with narcotic drugs known to have been smuggled into the United States is certainly no less reprehensible and probably no less a fraud upon the revenues than the offenses involved in the *Jordan* case.

The following cases support the view that, prior to the Immigration and Nationality Act of 1952, the recommendation of a sentencing judge against the deportation of an alien convicted of a violation of the law relating to the illicit traffic in narcotics, such as the violations here involved, was effective to prevent deportation. *Dang Nam* v. *Bryan*, 9 Cir., 74 F. 2d 379, 380-381; *Ex parte Eng*, D.C. N.D. Cal., 77 F. Supp. 74, 77.

It is our opinion that, because of the timely recommendations of Judge Reeves to the Attorney General that DeLuca be not deported because of his convictions in 1943, he was not, prior to the effective date of the Immigration and Nationality Act of 1952, subject to deportation because of such convictions. We do not agree, however, that the recommendations of the United States Attorney to the District Judge and the District Judge's recommendations to the Attorney General, under the circumstances disclosed by the record, constituted a binding contract between the United States and DeLuca that he should never be deported because of the convictions. As an alien, DeLuca could not acquire a right to permanent residence in the United States which Congress was bound to respect, nor could the United States Attorney or the District Judge impair the power of Congress to provide for the deportation of aliens whom it considered undesirable.

Judge Learned Hand, speaking for the United States Court of Appeals for the Second Circuit, in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490, said:

"The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate."

Aliens, so long as they are permitted to remain in the United States, are entitled to the protection of its Constitution and laws with respect to their rights of person and of property and to their civil and criminal responsibility. "But they continue to be aliens, * * * and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 724.

Legislation providing for the deportation of aliens is not invalid because retrospective in operation. *Mahler* v. *Eby*, 264 U.S. 32; *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 529; *Harisiades* v. *Shaunghnessy*, 342 U. S. 580, 594-595; *Galvan v. Press*, . . . U. S. , decided May 24, 1954; *United States ex rel. Barile* v. *Murff*, D.C. Md., 116 F. Supp. 163.

We find no merit in DeLuca's contention that he did not have a fair hearing before the Special Inquiry Officer because DeLuca's case was added to the Attorney General's

deportation list of cases to be given priority for treatment. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. Compare *Donnelly Garment Co.* v. *National Labor Relations Board*, 8 Cir., 151 F. 2d 854, 870-873, with *National Labor Relations Board* v. *Donnelly Garment Co.*, 335 U.S. 219, 236-2[illegible]. Moreover, there was no dispute as to the facts in DeLuca's case. The only issues were those of law which have been considered not only by the Special Inquiry Officer but by the Board of Immigration Appeals and the District Court. Cf. *United States ex rel. Marcello v. Ahrens*, D.C. E.D. La., 113 F. Supp. 22, 24.

The difficulty we have with this case is in spelling out any clear-cut authorization for the deportation of an alien such as DeLuca who was convicted of crimes involving moral turpitude but was saved from deportation because of the recommendations of the sentencing judge. Section 175 of Title 21 U.S.C., 1940 Edition, (hereinbefore quoted) indicated that Congress considered violations of Section 174 of that Title as crimes involving moral turpitude, since §175 made aliens convicted on narcotic charges under §174 deportable "in accordance with the provisions of sections 155 and 156 of Title 8 * * *," and since §155 related to deportation of aliens convicted of crimes involving moral turpitude, and §156 related to the manner of their deportation.

Whether Section 241(a) of the Immigration and Nationality Act of 1952, §1251(a) of Title 8 U.S.C., 1952 Ed., changed the status of DeLuca from a nondeportable alien to a deportable alien, we think is not clear. His status prior

to the Act was that of an alien convicted and sentenced for crimes involving moral turpitude, but not subject to deportation because of the recommendations of the sentencing judge. Section 241(a) (4) of the Act, §1251(a)(4) of Title 8 U.S.C., 1952 Ed., provides for the deportation of an alien who

"is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

Section 241(a)(4) of the Act does not expressly exclude an alien convicted and sentenced for a crime involving moral turpitude which is also a violation of a law relating to the illicit traffic in narcotic drugs, and Section 241(b) of the Act, §1251(b) of Title 8 U.S.C., 1952 Ed., provides that Section 241(a)(4) shall not apply if the sentencing court shall make a timely recommendation to the Attorney General that the alien be not deported.

It is true that Section 241(b) of the Act does not expressly authorize such recommendations with respect to an alien who at any time after entry has been a "narcotic drug addict, or who at any time has been convicted of any law or regulation relating to the illicit traffic in narcotic drugs." Section 241(a)(11) of the Act, §1251(a)(11) of Title 8, U.S.C., 1952 Ed.

It can be argued that by putting aliens who were drug addicts or were convicted of violations of the narcotic laws in a class distinct from those who were convicted and sentenced for crimes "involving moral turpitude", Congress intended to deprive aliens who prior to the effective date of the Act had been convicted of violations of narcotic laws but were nondeportable because of the recommendations of the sentencing judge, of their nondeportable status and to invalidate all such recommendations so far as narcotic convictions were concerned.

On the other hand, it can be argued that DeLuca was an alien who came within Section 241(a)(4) of the Act, as to whom the recommendations of no deportation would still be effective notwithstanding the provisions of Section 241 (a) (11).

To increase the uncertainty as to whether Congress intended to deprive an alien such as DeLuca of the benefit of the recommendations of the sentencing court, we have the so-called savings clause, Section 405(a) of the Act, 66 Stat. 280 (Note following §1101, 8 U.S.C., 1952 Ed., page 734), which, so far as pertinent, reads as follows:

"Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or *other document* or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceed-

ings, civil or criminal, brought, or *any status*, condition, right in process of acquisition, *act*, thing, liability, obligation, or matter, civil or criminal, *done or existing*, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, *acts*, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect." (Italics supplied.)

We question whether it is specifically provided in the Act that an alien convicted upon a narcotic charge involving moral turpitude, who the sentencing judge recommended should not be deported, should, nevertheless, be deported because of his conviction. Unless there is such a specific provision, it would seem that the savings clause is broad enough to preserve the efficacy of the recommendation of the sentencing judge and to prevent the deportation of the alien because of the conviction.

The record indicates that, since his convictions, DeLuca has been a law-abiding resident alien. The disastrous consequences of deportation to him would be so far out of proportion to any benefit the United States could seemingly derive from his removal from the country as to entitle him to have any reasonable doubts as to his deportability resolved in his favor. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority in the Act for depriving DeLuca of the status of a nondeportable alien resulting from the

recommendations of the sentencing judge that he be not deported.

The judgment appealed from is reversed and the case is remanded with directions to discharge DeLuca from custody under the order and warrant for deportation.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1954**

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# No. 145

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CARLOS MARCELLO,

*Petitioner*

*vs.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## BRIEF FOR PETITIONER

---

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1954**

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# No. 145

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CARLOS MARCELLO,

*Petitioner*

*vs.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR PETITIONER

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### Opinions Below

The opinion of the Court of Appeals (R. 32-44) is reported at 212 F. 2d 830. The opinion of the District Court (R. 19-24) is reported at 113 F. Supp. 22.

### Jurisdiction

The judgment of the Court of Appeals was rendered on May 6, 1954 (R. 45). The petition for a writ of certiorari, filed on June 17, 1954, was granted on October 14, 1954. The jurisdiction of this Court was invoked under 28 U. S. C. 1254(1).

## Questions Presented

1. Whether the issuance, prior to any deportation hearing, of an announcement by the Attorney General stating that petitioner was within his program to rid the country of undesirable persons, as reflected in the undenied allegations of the petition for habeas corpus and the evidence, established prejudgment and prevented a fair hearing.

2. Whether deportation hearings conducted under the McCarran-Walter Act (8 U. S. C. 1252-b) are required to conform to the separation of functions provisions (5 U. S. C. 1004) of the Administrative Procedure Act.

3. Whether, apart from the Administrative Procedure Act, deportation hearings which permit hearing officers to be subject to the control of superiors who investigate and prosecute, fail to conform to generally accepted standards of fairness and impartiality required by due process.

4. Whether deportation fifteen years later for a crime committed in 1938 which was not a deportable offense until 1952, violates the *ex post facto* provisions of the Constitution.

## Constitutional Provisions, Statutes and Regulations Involved

The applicable statutes are set forth in the appendix herein beginning at page 57.

## Statement

Petitioner, a 43 year old native of Tunis, Africa, came to the United States lawfully for permanent residence on October 7, 1910, when he was eight months old. Except for a one hour visit to Mexico, he has been here ever since. He is married to an American citizen and has four American-born children. His father, formerly a citizen of Italy, became a citizen of the United States in 1942 and is now deceased. His mother is still a resident of the United States (R. 4, 68, 78, 80; Immigration Transcript, Ex. H pp. 2-3).

On October 29, 1938, petitioner was convicted of violation of the Marihuana Tax Act of 1937 (26 U. S. C. 2591) and sentenced to imprisonment for one year (R. 54). At that time and until December 24, 1952, such conduct did not render an alien deportable (R. 56).

Attorney General McGranery ordered the arrest of petitioner in deportation proceedings on December 30, 1952. On that day, he issued a press release stating that petitioner's arrest was a step in his program to deport undesirables, that petitioner was engaged in large scale slot machine operations, and that his marijuana conviction in 1938 was a deportable offense under the new Immigration and Nationality Act (Appendix B herein, p. 64 *infra*). The Attorney General's announcement was reflected in front page headlines of all the New Orleans' newspapers for December 30 and 31, 1952 (Immigration File, Exhibit 7; see also R. 67). Several of these newspapers (The New Orleans Item and The New Orleans States devoted almost their entire front page to the deportation arrest of petitioner. (Immigration File, Exhibit 7, Respondent's 1 and 2). The New Orleans States for December 31, 1952, editorialized that however controversial the McCarran-Walter Act, it was to be praised for that part which offered hope for getting rid of Carlos Marcello. (Immigration File, Exhibit 7, Respondent's 4).

The petition for a writ of habeas corpus herein alleges without contradiction by any subsequent pleading that the Attorney General's announcement described petitioner as an undesirable, and that petitioner was on a proscribed list of alien deportees prepared by the Attorney General in 1952 (R. 7, 8; par. XI, XII).

A deportation hearing was held on February 16, 1953. Objections to the hearing upon the ground that it violated the Administrative Procedure Act and due process were overruled. Deportation was directed on February 20, 1953.

A request to reopen, to consider discretionary relief in the form of suspension of deportation pursuant to 8 U. S. C. 1254, (which would waive the grounds of deportation and reinstate petitioner's permanent residence) was denied (R. 67-81).

The Board of Immigration Appeals affirmed (R. 54-67). The Board assumed that petitioner might be eligible for suspension of deportation but upon the basis of a criminal offense for which he was pardoned; his refusal to testify before the Kefauver Committee upon the ground of self incrimination, and the newspaper stories herein (Exhibit 7), introduced to show prejudgment (Immigration Transcript p. 10), determined to deny discretionary relief to petitioner (R. 66, 43).

## Pleadings and Judicial Proceedings Below

The petition for habeas corpus filed herein subsequent to the decision of the Board of Immigration Appeals alleges:

1. That petitioner was denied a fair hearing by reason of the Attorney General's announcement, prior to the deportation hearing, that petitioner was undesirable and the Attorney General's inclusion of petitioner on a proscribed list of deportees (R. 7-8, par. XI, XII).

2. That petitioner's deportation hearing was unfair by reason of its failure to conform to due process, the separation of functions requirement of the Administrative Procedure Act, and currently prevailing standards of fairness (R. 5-7, par. VII-XI).

3. That petitioner's deportation under a retroactive 1952 law for non-deportable criminal conduct in 1938 violated Article 1, Section 9, Clause 3 of the Constitution (R. 9-11, par. XV-XVIII).

The return to the writ of habeas corpus failed to deny

the allegation relative to prejudgment or the Attorney General's announcement. It alleged in conclusory form, however, that the deportation hearing was conducted in conformity with the Constitution and applicable laws and regulations. Petitioner's immigration file was attached to the return (R. 14-16). It constituted the sole item of evidence at the habeas corpus hearing (R. 18).

The District Court, after noting that the deportation procedure followed herein under 8 U. S. C. 1252b, varied "in some particulars from the procedure under the Administrative Procedure Act," concluded that petitioner had a fair hearing "meeting currently prevailing standards of impartiality." (R. 22) and discharged the writ (R. 24-25).

The Circuit Court of Appeals affirmed and ruled as follows:

1. The deportation procedure followed herein under Section 242(b) (8 U. S. C. 1252b) "does not accord with Section 5(c) of the Administrative Procedure Act" (R. 36). Section 7(a) of the Administrative Procedure Act (5 U. S. C. 1006a) grants an exemption from Section 5(c). It was further held "that to the extent the proceedings prescribed by Section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings". (R. 38).

2. The Administrative Procedure Act is not the sole criterion for fair hearings, and the petitioner's deportation hearing conformed to procedural due process (R. 39-41).

3. Petitioner did not prove the allegations of prejudgment by reason of the Attorney General's announcement or a proscribed list. In any event, petitioner was deportable as a matter of law (R. 41-42).

4. "It was not improper for the Board (of Immigration Appeals) to consider appellant's prior convictions, his

numerous arrests, and his refusal to give testimony before a Senate Investigating Committee in the exercise of its discretion to deny his application (for suspension of deportation). Although only three of his arrests resulted in convictions, and upon a holding that he was not criminally liable for refusing to testify before the Senate Committee, one of these was reversed, and he received a full pardon from another, the Board was not precluded from considering these factors in reaching its conclusion" (R. 44).

5. No violation of Article 1, Section 9, Clause 3, of the Constitution is presented (R. 42).

## Summary of Argument

The Government itself, through the Attorney General (the hearing officer's superior), was a militant conscious participant in a deportation hearing by newspapers. The evidence and the undenied allegations of the habeas corpus petition established prejudgment and unfairness created by the Attorney General's proscribed list and his press release. *U. S. ex rel Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1, 1952). Moreover, erroneous considerations, including this adverse newspaper publicity, a conviction which was pardoned, a conviction which was reversed, and reliance upon a plea of self-incrimination, motivated denial of discretion herein.

Failure of the Immigration Service to isolate the hearing officer from superiors who investigate and prosecute in conformity with 5 U. S. C. 1004(c) rendered the hearing null and void. It did not conform to currently prevailing standards of fairness as required by due process. *Sung* v. *McGrath*, 339 U. S. 33 (1950). The 1952 Immigration and Nationality Act (8 U. S. C. 1252b) did not exempt the de-

portation process from the requirements of separation of functions [5 U. S. C. 1004(c)] in view of the provisions of 5 U. S. C. 1011 requiring an express exemption in subsequent legislation and the absence of any inconsistent provision authorizing superiors who investigate and prosecute.

The deportation of petitioner for criminal conduct in 1938 for which petitioner paid his debt to society can not be made the basis for deportation in 1952 without violating the constitutional prohibition against *ex post facto* laws. We respectfully seek reconsideration of this issue, mindful that the "slate is not clean," *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) in the spirit of Mr. Justice Brandeis and Mr. Justice Holmes who declared that "no lapse of time or respectable array of opinion shall make the Court hesitate to correct an unconstitutional assumption of power by the courts of the United States." *Erie Railroad* v. *Tompkins*, 304 U. S. 64 at 79 (1937).

## I

### Procedural Due Process Was Denied Petitioner by Reason of Prejudgment and Governmental Trial by Newspapers

The habeas corpus petition alleges without contradiction that on the day petitioner was arrested in deportation proceedings, the Attorney General announced that "he was an undesirable citizen and had been guilty of many crimes and that the proceedings were specially designed to deport petitioner," that such publicity was bound to have great effect upon the deportation hearing officer (R. 7, par. XI), and that petitioner was upon a list of deportees prepared by the Attorney General in 1952 (R. 8, par. XII). Newspaper clippings introduced in evidence at the deportation hearing repeated that petitioner's arrest was pursuant to a program of the Attorney General "for ridding the country of 'undesirable persons of foreign birth who are engaged in racket-

eering or other criminal activities' " (R. 67). The official press release of the Department of Justice (Appendix B, herein, p. 64), in addition, states that petitioner is engaged in gambling activities in Louisiana, that his 1938 marijuana conviction is "a deportable offense under the new Immigration and Nationality Act," and that the deportation arrest "follows lengthy investigation by both the Federal Bureau of Investigation and the Immigration and Naturalization Service." The Attorney General's announcement produced two-inch bold face front page headlines in the New Orleans Item and the New Orleans States for December 30, 1952. Both newspapers devoted almost their entire front pages to petitioner's case, repeating that the arrest was pursuant to the Attorney General's deportation program and that Marcello's 1938 offense rendered him deportable (Immigration File, Exhibit 7, Respondent's 1 and 2). News stories on December 31, 1952, and January 6, 1953, (prior to the deportation hearing of February 16, 1953) set forth predictions of immigration officials that Marcello would be deported and offered praise editorially for legislation which offered hope "for getting rid" of Carlos Marcello (Immigration File, Exhibit 7, Respondent's 4-6). It was against this background that petitioner was accorded a deportation hearing on February 16, 1953.

The Court of Appeals held that petitioner did not prove the allegations of his petition for habeas corpus (R. 41-42). We submit that such ruling may not be sustained. The allegations of the petition were not denied by the conclusory allegations of the traverse that "the deportation hearing was conducted in accordance with the constitution" (R. 15, par. 4). *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 153, 156 (C. A. D. C., 1942). Under Rule 8(d) of the Rules of Federal Practice, "averments in a pleading to which a responsive pleading is required • • •

are admitted when not denied in the responsive pleading." *Mangaoang* v. *Boyd*, 186 F. 2d 191 (C. A. 9, 1950); *McComb* v. *Blue Star Auto Stores Inc.*, 164 F. 2d 329 (C. A. 7, 1947), *cert. denied*, 332 U. S. 855; *Moore* v. *Linahan et al.*, 117 F. 2d 140 (C. A. 2, 1941) *cert. denied*, 314 U. S. 628; *Fontes* v. *Porter*, 156 F. 2d 956 (C. A. 9, 1946); *Zydney* v. *New York Central Men's Credit Ass'n*, 113 F. 2d 986 (C. A. 2, 1940); *Whitten* v. *Tomlinson*, 160 U. S. 231, 242 (1895).

In view of the actual facts, the undenied allegations of the petition herein, and Exhibit 7, this record establishes that the Attorney General included petitioner on a list or within a program of deportees in 1952 (R. 8, par. XII).

In *U. S. ex rel Accardi* v. *Shaughnessy*, 347 U. S. 260, 267 (1954), this Court observed with reference to the Attorney General's 1952 deportation list:

> "public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation, to the contrary, those listed were persons whom the Attorney General 'planned to deport.'"

Here, the Attorney General went further. He publically announced, prior to any deportation hearing, that Marcello was an undesirable who committed a deportable offense and who was within his deportation program. The Department of Justice, thus, not only prejudged Marcello's case, *U. S. ex rel Accardi* v. *Shaughnessy, supra*, but also became a conscious militant participant in trial by newspapers which had Marcello deported (Exhibit 7, Respondent's 5 and 6) prior to his hearing. Could Marcello secure a fair deportation hearing under these circumstances; or was he not entitled to fairness because he was deportable as a matter of law as noted by the Court of Appeals. (R. 42)?

Justice Brandeis observed that: "In the development of our liberty insistence upon procedural regularity has been

a large factor," *Bardeau v. McDowell*, 256 U. S. 465, 477 (1921).

The hearing contemplated by the immigration law and regulations (8 U. S. C. 1252b; 8 C. F. R. 242.53b) is a fair and impartial one. In administrative hearings, the liberty of individuals should be "protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . . Such a hearing has been described as an 'inexorable safeguard.'" *Morgan* v. *United States*, 304 U. S. 1, 14, 15 (1937). And in this connection, it should be observed, that the "fact that a judgment may be justified on the merits does not obviate the requirement of a fair hearing." *National Labor Relations Board* v. *Bryan Mfg. Co.*, 196 F. 2d 477, 478 (C. A. 7, 1952); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F. 2d 147, 149 (C. A. 8, 1939); *Sung* v. *McGrath*, 339 U. S. 33 (1950).

> ". . . for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judgment is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." *National Labor Relations Board* v. *Phelps*, 136 F. 2d 562, 563 (C. A. 5, 1943). See also *In re K-3 Pike and Fischer*, Administrative Law (2d) 668 (1953).

Had the Attorney General acted in this fashion—had he issued press releases about a program and included a pend-

ing jury case within the program—there can be no doubt that it would be held that there was interference with the functions of the jury. *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1, 1952). As in the *Delaney* case, an atmosphere was created here, by the Department of Justice itself, which prevented fair, open, and impartial consideration. This Court recently noted: "A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder" *Remmer* v. *United States*, 347 U. S. 227, 229 (1954).

The hearing officer and the Board of Immigration Appeals, required by regulations having the force of law (8 C. F. R. 242.53b) and due process [*The Japanese Immigrant Case* 189 U. S. 86 (1903) *Sung* v. *McGrath*, *supra*] to act impartially and exercise their independent judgment, should have felt free to exercise their functions without the Attorney General's press release staring over their shoulders. The fact that the Attorney General was their superior, only made the force of the conduct herein more persuasive upon the ultimate decision. The proscribed listing of Marcello for deportation in advance of hearing, his inclusion within a program to deport as reflected in the press release (Appendix B, herein) as well as newspaper accounts, and the published predictions of immigration officials that Marcello would be deported (Immigration File, Respondent's 6)—all necessarily had a prejudicial effect upon the hearing officer and the Board, even as they would have had upon a jury.

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons deemed presumptively prejudicial if not made in pursuance of known rules of the court and the instructions and directions of the

court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer* v. *United States*, *supra*.

The public announcement of the Attorney General in the instant case created an atmosphere of prejudice and interfered with the due process hearing to which petitioner was entitled.

The fallacy of the Court of Appeal's ruling that Marcello was not entitled to a fair hearing because he was deportable as a matter of law also overlooks the fact that discretion could have been exercised here to suspend deportation. What is most shocking, in this connection, is the fact that the Board of Immigration Appeals utilized, *inter alia*, the unfavorable newspaper accounts inspired by the Department of Justice as one of the grounds for denying suspension of deportation (R. 66). Here is a bold and forthright admission of the improper effect of trial by newspaper instigated by one who sat in prejudgment in this case.[1]

## II

## The Deportation Hearing Was Void for Failure to Comply With the Separation of Functions Requirement of the Administrative Procedure Act.

Petitioner has been accorded a deportation hearing under the 1952 Immigration and Nationality Act (8 U. S. C. 1252b)

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[1] The Court of Appeals also sanctioned the use of a pardoned crime, a plea of self incrimination, and mere arrests as proper bases for denying discretion (R. 42). We submit that these were improper grounds for denying discretion. A pardon blots out the crime. *Ex parte Garland*, 4 Wall. 333 (1867). The plea of self incrimination may not properly be utilized for inference of guilt. *U. S. ex rel Beltrago* v. *Shaughnessy*, 212 F. 2d 128 (C.A. 2, 1954); *Burdick* v. *United States*, 236 U. S. 79-95 (1914); *Johnson* v. *United States*, 318 U. S. 189, 196 (1943); *Maffie* v. *United States*, 209 F. 2d 225, 227-29 (C.A. 1, 1954); *U.S. ex rel.*

before a special inquiry officer to determine whether his fate will be exile and banishment from the only land he knows, a land where his parents reside as well as his wife and four children.

The habeas corpus petition alleges, without dispute, that this special inquiry officer was subject to those who engaged in investigatory and prosecutive functions (R. 6, par. X). Indeed the Court of Appeals acknowledged that the deportation procedure followed herein "does not accord with section 5(c) of the Administrative Procedure Act" (R. 36).

Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) requires that in every case of adjudication required by statute, hearing officers shall not be responsible to officials engaged in investigatory functions and precludes such hearing officers from participating in investigatory or prosecuting functions in the same or a factually related case.

The Administrative Procedure Act requires that: "The separation of functions here required must be reflected in the rules of organization and procedure published pursuant to section 3(a)" of the Administrative Procedure Act. (*Senate Document 248*, 79th Congress, p. 262).

There is no dispute that the Immigration Service failed to comply with this mandate of the Administrative Procedure Act. Hearing officers are not only permitted to engage in investigations in factually related cases but are also subject to superiors who investigate and prosecute immigration cases—a situation which not only creates a psychological hazard to fairness but also a real danger that "the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers . . ." *Report*

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*Heikkinen* v. *Gordon*, 190 F. 2d 16, 19, 20 (C.A. 8, 1951), dismissed as moot 344 U.S. 870; *Zydok* v. *Butterfield*, 183 F. 2d 802, 803 (C.A. 6, 1951), vacated on other grounds, 342 U.S. 524. Nor may arrests without convictions be a ground for adverse reflections against petitioner. *U. S. ex rel. Castro-Lousan* v. *Zimmerman*, 94 F. Supp. 22 (E.D. Pa., 1950).

*of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome*, 162 (1953).

If it be found that the deportation procedure was subject to the Administrative Procedure Act, then the deportation order entered in this case is null and void. Section 9 of the Act (5 U. S. C. 1008) prohibits the imposition of sanctions not authorized by law. It therefore remains to be seen whether the deportation hearing accorded petitioner was exempt from Section 5(c) of the Administrative Procedure Act by reason of the provisions of Section 242(b) [8 U. S. C. 1252b] of the 1952 Immigration and Nationality Act.

(A) *Section 12 of the Administrative Procedure Act.*

In its appraisal of the problem here presented, the Court of Appeals overlooked Section 12 of the Administrative Procedure Act (5 U. S. C. 1011). This section provides:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Does the 1952 Immigration and Nationality Act expressly provide for commingling of functions, an evil which this Court described as particularly objectionable in deportation cases. *Sung* v. *McGrath*, 339 U. S. at p. 46?

(B) *History of Section 242(b) of the 1952 Immigration and Nationality Act*

*1. H. R. 6652 and The Hobbs Bills*

After this Court's decision in *Sung* v. *McGrath*, *supra*, the Immigration Service instituted efforts to secure full exemption from the provisions of the Administrative Procedure Act. *H. R. 6652*, 80th Congress 2d Session sought to relieve the Service by an amendment to the Administrative Procedure Act as follows:

"Except as to the requirements of section 3 [public information section] there shall be excluded from the operation of this Act . . . functions and proceedings authorized or required pursuant to the immigration and nationality laws. . . ."

The Committee report on this bill, which came through the House Immigration Committee (*House Report 2140*, 80th Congress, 2d Session, p. 1) noted:

"It is necessary to provide expressly for an exemption from the Administrative Procedure Act because of the provision found in section 12 of that act which reads:

'No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly'."

This bill, which inspired a vigorous minority report that its passage would start a queue of agencies seeking exemption (*House Report 2140, supra* p. 9) was not enacted. Efforts, however, continued with the introduction of the so-called Hobbs Bill in the 81st Congress, 1st Session (*H. R. 10*) which sought to grant specific exemption from sections 5, 7, 8, and 10 of the Administrative Procedure Act. Several organizations, including the American Bar Association opposed this exemption (*House Report 1792*, 81st Congress, 1st Session p. 20; House Immigration Hearings on H. R. 10, 81st Congress, Part 2, p. 1). Although the bill was reported favorably and approved by the House, it failed of enactment after the Senate had eliminated the exemption provisions. (*Senate Report 2239*, 81st Congress, 2d Session).

*2. The Appropriations Rider.* On September 27, 1950, efforts succeeded to exempt the Immigration Service from the Administrative Procedure Act. Tacked on to the Supplemental Appropriations Bill of 1951, without full leg-

islative comment [2] was the following [64 Stat. 1044; 8 U. S. C. 155(a)]:

> "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007).

This provision is inapplicable in the instant case, having been repealed by section 403(a)(47) of the 1952 Immigration and Nationality Act, effective December 24, 1952 (66 Stat. 280).

*3. The Original Bills.* On April 20, 1950, Senator McCarran introduced the first omnibus bill to revise the immigration laws (*S. 3455*, 81st Congress, 2d Session). Express reference was made to the Act of June 11, 1946—the Administrative Procedure Act. Section 242(b) of this original bill provided as follows:

> "Before the Commissioner shall issue a warrant for the deportation of any alien, a finding of deportability shall be made in the case of such alien by a special inquiry officer after proceedings at which the alien shall be present and which shall be appropriate to the case and just to the party affected, under such regulations as the Commissioner shall prescribe. *Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so prescribed shall be the*

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[2] For the background of this rider, see Senate Hearings, Committee on Appropriations on the Supplemental Appropriations for 1951, 81st Congress, 2d Session, p. 751-755, and Joint Hearings before Sub Committees of the Committees on the Judiciary on S. 716, H. R. 2379 and H. R. 2816, 82nd Congress, 1st Session, p. 536.

In the curtailed debates the following exchange occurred (96 Cong. 13505):

"Mr. Judd: Is it not true that there probably have been more cases of injustice and arbitrary action in this sort of one man kangaroo court in the Immigration Service than almost anywhere else in the United States Government?

"Mr. Walter: That is true * * *".

*sole and exclusive procedure for determining the deportability of an alien who is in the United States.* Before any such proceedings shall be held, the aliens shall be served with a written notice thereof in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. At the proceedings the alien may, if he so elects, have the advice and assistance of counsel, cross-examine any witnesses supporting the charges against him, and present evidence on his own behalf. Any finding of deportability made as a result of such proceedings shall be based solely upon the evidence adduced therein, and no such finding shall be made unless there is probative evidence to support it." (Italics supplied).

*S. 716* introduced by Senator McCarran on January 29, 1951 (82d Congress, 1st Session) and *H. R. 2379*, introduced by Congressman Walter during the same session again referred specifically to the Administration Procedure Act. These bills provided as follows:

"(b) A final order of deportation in any case shall be made by the Attorney General only upon a record made in a proceeding before a special inquiry officer, at which the alien shall be present. Such proceedings before a special inquiry officer shall be in accordance with such regulations as the Attorney General shall prescribe. No immigration officer shall act as the special inquiry officer under this section in any case in which such officer has engaged in investigative or prosecuting functions. Such regulations shall include as minimum requirements that—

(1) the alien shall have notice of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented by counsel of his choice at no expense to the Government;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision shall be valid unless it is based upon probative evidence.

Provisions shall also be made which, in the opinion of the Attorney General, are necessary and proper to safeguard the rights and privileges of mentally incompetent aliens against whom such proceedings are instituted, in whose cases the application of the preceding provisions of this subsection are impractical.

*Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States.*" (Italics supplied)

Hearings were held on the above bills and several organizations, including the American Bar Association opposed any proposed exemption under the Administrative Procedure Act. *Joint Hearings Before the Sub-Committees of the Committee on the Judiciary on S. 716, H. R. 2379, and H. R. 2816* pp. 591, 691-2, 739.

Thereafter *S. 2055* (August 27, 1951) and *H. R. 5678* (October 9, 1951) were introduced in the 82nd Congress. In these versions of the bill, *S. 2550*, introduced on January 29, 1952, and the bill as enacted, the language "*Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237)*" was deleted (Appendix A, p. 58).

*1. House Debates.* After the deletion noted above, Congressman Walter and Senator McCarran—the co-sponsors of the Administrative Procedure Act and the 1952 Immigra-

tion Act assured both houses of Congress that the Administrative Procedure Act would apply to deportation procedures.

On April 23, 1952, Congressman Walter said (98 Cong. Rec. 4302):

> "What do we do in this act? Instead of destroying the Administrative Procedures Act, we undo what Congress did in a deficiency appropriation b several years ago when it legislated to overturn a decision of the Supreme Court which ruled that the Administrative Procedures Act is applicable to deportation proceedings. We undo that. So here, instead of our destroying the Administrative Procedures Act, we actually see that it is reinstated in every instance."

The next day, he continued (98 Cong. Rec. 4416) as follows:

> "I would like to remind the gentleman of one thing, that Senator McCarran who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted." [The reference to paragraph 46 of page 163 apparently should be to the same paragraph of page 161 of H.R. 5678, *supra*, which repealed the appropriations rider of September 27, 1951, *supra*.]

*Senate Debates.* On the floor of the Senate, Senator McCarran repeatedly stressed the fact that the Administrative Procedure Act was to be preserved. On May 16, 1952, Senator McCarran observed:

"* * * a perusal of the bill would convince any fairminded man that the bill is 100 percent within the framework of the Administrative Procedure Act, which, incidentally I sponsored and authored in the Senate." (98 Cong. Rec. 5329).

On May 21, 1952, Senator McCarran stated:

"Under the provisions of section 242 of Senate bill 2550, this exemption (Supplemental Appropriations Act of 1951) is terminated. * * *

Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act.

* * * * *

Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act." (98 Cong. Rec. 5626)

The following day he assured the Senate:

"The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now.

* * * * *

The bill provides for administrative procedures and makes the Administrative Procedure Act applicable insofar as the administration of the bill is concerned." (98 Cong. Rec. 5778).

(C) *Section 242(b) does not expressly modify Section 5(c) of the Administrative Procedure Act.*

Section 5(c) of the Administrative Procedure Act (Appendix A, *infra*, p. 62) sets forth the following requirements:

1. Except with regard to *ex parte* matters, the hearing officer may not consult anyone on a fact in issue without opportunity for all parties to participate.

2. The hearing officer may not be responsible to or subject to the supervision or direction of any employee engaged in investigative functions for the agency. [There is no dispute that the special inquiry officer herein was subject to the supervision of an Officer in Charge (at New Orleans), a District Director at Miami, Operations Advisors and Assistant Commissioners in Washington who were engaged in investigative functions for the Immigration and Naturalization Service, as well as others in the Department of Justice who were engaged in like functions. Paragraph X of the habeas corpus petition (R. 6) is not denied.]

3. The hearing officer may not be responsible to any employee engaged in prosecuting functions for the agency. (The situation noted above obtains here).

4. Officers engaged in investigative functions in any case may not participate or advise in that case or in a factually related case except as a witness or counsel in public proceedings. [Section 242b forbids the special inquiry officer from participating in the same case. If Section 5(c) is applicable, a special inquiry officer may not investigate a factually related case one day and sit in judgment upon that type of case the next. The difficulty in permitting investigation of factually related cases is illustrated by Mr. Justice Jackson in *Saung* v. *McGrath*, 339 U. S. at p. 45, where he stated: "the inspector's duties include investigation of like cases; and while he is today hearing cases in-

vestigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today."]

5. Officers engaged in prosecuting functions in any case for an agency may not participate in the decision in that case or a factually related case except as a witness or counsel in public proceedings. [Under Section 242(b) a special inquiry officer is directed to present evidence, examine and cross examine the alien and his witnesses. This is probably the dual-examiner exemption from the Administrative Procedure Act referred to by Senator McCarran as the sole digression from that Act, *supra*, p. 29].

The problems raised by this phase of the case are twofold: *First*, whether, in view of Section 12 of the Administrative Procedure Act, section 242(b) or section 5(c) prevails insofar as they are inconsistent. Can there be an implied repeal or exemption when the Administrative Procedure Act requires an express one?

*Secondly*, insofar as sections 5(c) and 242(b) are not inconsistent, does section 5(c) prevail?

Section 12 of the Administrative Procedure Act is quite specific. There shall be no implied repeals or modifications. Only express exemptions from the Administrative Procedure Act are to be recognized. Congress was aware of this when exemption was proposed for the Immigration Service in H.R. 6652 in the 80th Congress (*supra*, p. 15) and when the Appropriations Rider of 1950 became law (64 Stat. 1044; 8 U.S.C. 155a).

Subsequent inconsistent legislation normally effectuates an implied modification or repeal of earlier legislation. *United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921); *United States* v. *Belt*, 319 U.S. 521 (1943). But, here, Congress, itself, called for an express, not an implied exemption. *National Labor Relations Board* v. *Stacker Mfg. Co.*, 185 F. 2d at 454 (C.A. 3, 1950). Its failure to provide for an express repeal in section 242(b) and its specific removal

of reference therein to the Administrative Procedure Act, reinforce the proud boast of the co-authors of the 1952 Immigration and Nationality Act that "the Administrative Procedure Act prevails now," (98 Cong. Rec. 5778). It "is reinstated in every instance," (98 Cong. Rec. 4302).

This construction that section 5(c) prevails and that the deportation hearing herein is consequently invalid, removes the constitutional objections which we voice below in Point III. This construction conforms to "the duty of federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution," *Dennis* v. *United States*, 341 U.S. 494, 501 (1950) and avoids the fears expressed by Mr. Justice Jackson in *Sung* v. *McGrath*, *supra*, that exemption from the Administrative Procedure Act might bring the Immigration Act "into constitutional jeopardy." In addition, the construction we advocate, is in harmony with the "cardinal principle of construction that repeals by implication are not favored." When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States* v. *Borden*, 308 U.S. 188, 197 (1939); *Rosenberg* v. *United States*, 346 U.S. 273 at 295 (1953); *National Labor Relations Board* v. *Stocker Mfg. Co.*, *supra*.

The Administrative Procedure Act can be interpreted to supplement the requirements of section 242(b), even as 242(b) intended that regulations be promulgated to implement its provisions. Such interpretation would avoid constitutional difficulties, dispense with the disfavored repeal by implication, and give effect to both statutes.

However, if it be assumed that section 242b repealed section 5(c) insofar as the two are inconsistent, we submit, then, that section 5(c) was not repealed for immigration purposes in its entirety. The only possible inconsistency is the dual-examiner exemption noted by Senator McCarran (98 Cong. Rec. 5626). There is no requirement in section 242(b) that special inquiry officers

be subject to those who investigate or prosecute, and upon this ground alone the hearing below was invalid. The argument advanced against this construction is that a full exemption from section 5(c) is granted under 7(a) of the Administrative Procedure Act, or under section 242(b)'s limitation as to sole and exclusive procedure.

(D) *Section 7(a) of the Administrative Procedure Act does not exempt deportation hearings from the requirements of section 5(c).*

The Circuit Court was of the opinion that section 7(a) of the Administrative Procedure Act granted the Immigration Service an exemption from section 5(c) (R. 38).

Section 5(c) of the Act requires separation of investigatory and adjudicatory functions. It exempts the top men in any governmental organization by excepting the agency or any member or members of the body comprising the agency. (*Senate Document 248*, pp. 262, 361).

In his *Manual, on the Administrative Procedure Act* (1947), the Attorney General states at pp. 71-72:

> "The requirements of section 7 are closely integrated with those of section 5(c) (as to certain types of adjudication) and 8 . . . The first sentence of section 7(a) provides that 'There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises an agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part before boards or other officers specially provided for or designated pursuant to statute' . . . *The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards 'specially provided for by or designated pursuant to statute' . . . Generally, whoever presides at the*

> *hearing (whether an examiner pursuant to section 11, a member of the agency or a special statutory board or hearing officer) is subject to the remaining provisions of the Act.* Sen. Rep. p 21; H. R. Rep. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case." (Italics supplied).

Section 7(a) was not intended to cancel or reduce the application of section 5(c). On the contrary it supplements it.

> "As heretofore stated in connection with sections 4 and 5, the bill requires no hearings unless other statutes contain such a requirement in particular cases of either rule making or adjudication. This section 7, therefore, is merely supplementary to sections 4 or 5 in the relevant cases." *Senate Document* 248 p. 206. See also: pp. 227, 252, 268.

Deportation proceedings are within the exemption of section 7(a) of the Administrative Procedure Act on the assumption that such hearings are required by statute before specially designated officials of the Immigration Service. It is clear however, that special inquiry officers are subject to the prohibitions of section 5(c). They are not the agency or a member of the agency (5 U. S. C. 1001)—the only hearing officers specifically exempt by the Act from the operation of section 5(c). If the Attorney General presided at a deportation hearing, he alone would be exempt. (*Senate Document 248*, p. 262). The provisions of section 7(a) were not designed to exempt hearing examiners from the requirement of section 5(c) which contains its own ex-

ceptions. This is fortified by the legislative history of the Act.

In the Senate Committee Report of 1945, p. 21 (*Senate Document 248, supra*, p. 207) it is stated with reference to Section 7(a):

> "This subsection provides two mutually exclusive methods of hearing—by the agency itself (or one or more of its members) or by subordinate officials. *A third kind of hearing officer recognized in this subsection is one specially provided for or named in other statutes. Whoever presides is subject to the remaining provisions of the bill.*" (Italics supplied.)

And again in the House Committee Report of 1946 it is repeated with reference to all hearing officers recognized in section 7(a) that:

> "Those who so preside are subject to the remaining provisions of the bill." *Senate Document 248, supra*, p. 268.

(E) *Section 242(b) does not set forth the all inclusive procedures for deportation.*

It is said that exemption was accorded from the separation of functions requirement in the recital in section 242(b) that "the procedures so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." In the original draft (*S. 3455, supra*, p. 16) provision was made for a depertation proceeding before a special inquiry officer, and it was followed by a sentence specifying that "the proceeding so prescribed" shall be the sole and exclusive procedure for determining deportability. The final version contains requirements for Immigration Service regulations as to notice, right to counsel, right to cross examination and evidence. Omitting these and like provisions, the section reads:

"A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses and as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. * * * The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *"

Section 101(b)(4) of the Act [66 Stat. 171; 8 U.S.C. 1101 (b) (4), Appendix A, p. 60, *infra*] defines a special inquiry officer as one deemed specially qualified by the Attorney General to conduct proceedings under the Act and authorizes regulations (not inconsistent with the Act) covering the duties and supervision of special inquiry officers.

Obviously, then, section 242(b) was not intended to be all inclusive with regard to deportation procedures. It authorized regulations to implement the Act. Regulations could provide, consistently with the Immigration Act and in the language of section 5(c) of the Administrative Procedure Act that:

No special inquiry officer shall be "responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

Then, section 242(b) did not eliminate such requirement of section 5(c), especially if it be recalled that an express modification is necessary under section 5(c) [5 U.S.C. 1011]. In the light of Senator McCarran's remarks, (98 Cong. Rec. 5626) and 5 U.S.C. 1011, it can not be assumed that the Attorney General was given an option whether to comply with the consistent portions of section 5(c) of the Administrative Procedure Act. It should also be observed that no published regulations require a special inquiry officer to be responsible and subject to immigration officials who investigate or prosecute. This commingling of functions continues to exist by reason of a continuation of practices condemned by *Sung* v. *McGrath, supra.*

Under the 1952 Act, the Board of Immigration Appeals is continued *inter alia* for the purpose of hearing appeals in deportation cases, 8 C.F.R. 6.1(b)(2) (1952 Ed.). If the sole and all inclusive method of deporting aliens is set forth in section 242(b), then there is no room for a non-statutory Board of Immigration Appeals nor for certification of deportation cases to the Attorney General, himself, 8 C.F.R. 6.1(h).

Under the 1952 Act the dual examiner function of the special inquiry officer is not considered mandatory. Regulations [8 C.F.R. 242.53(f), 1952 Ed.] permit the assignment of an examining officer to "conduct any required interrogation of the respondent and of the witnesses in behalf of the Government, examine or cross-examine the respondent's witnesses and present witnesses bearing upon the question whether the respondent is subject to deportation." Thus, the Immigration Service, itself, has interpreted section 242(b) to permit utilization of a prosecuting official in addition to a hearing officer—a requirement of the Administrative Procedure Act which we contend is not inconsistent. In fact, such procedure was followed in the instant case (Immigration Transcript, p. 7). This reinforces our

construction that the enumeration of items in section 242(b) is not all inclusive.[3]

With the original bill in mind (*S. 3455*), it is clear that Congress intended that the sole and exclusive method of according an alien a deportation hearing was to be before a special inquiry officer. Other deportation procedures, including the nature of supervision over the special inquiry officer [Section 101(b)(4); 8 U.S.C. 1101(b)(4)], the utilization of examining officers [8 C.F.R. 242.53(f)], the appeal of cases to the Board of Immigration Appeals, and certifications to the Attorney General were not covered by the statute, but left to other rules or regulation. Such a statute was obviously not all inclusive. Such a statute did not repeal the Administrative Procedure Act expressly or by the disfavored method of implication. Such a statute, as we observed before, should be read together with the Administrative Procedure Act to give effect to both (*United States* v. *Borden*, *supra*) and to avoid constitutional jeopardy.

We submit that section 242(b) was not inconsistent with the separation of functions provisions relating to supervisors who investigate or prosecute since it was silent on this issue. Therefore, both acts should be enforced.

## III

### Commingling of Functions in Deportation Proceedings Denies Due Process and Fails to Conform to the Generally Accepted Standards for Fair Hearings

Apart from the considerations noted in Point II, we sub-

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[3] Unfortunately, the 1952 Immigration Act lacks the preciseness that legislation should have. Professor Max Rheinstein of the Chicago University Law School contends that "it is an abomination on the English language * * * * worse than the Code of Internal Revenue." Former Attorney General McGranery testified that the Act contained numerous ambiguities. *Hearings before the President's Commission on Immigration and Naturalization* (1952) pp. 774, 1350.

mit that the admitted commingling of functions herein, prevented the due process hearing required by the Constitution.

(A) *The requirement of procedural due process in deportation cases.*

Deportation proceedings brought against resident aliens must conform to the Fifth Amendment's requirement of procedural due process. So much is settled by decisions of this Court, *Japanese Immigrant Case,* 189 U.S. 86 (1903); *Kwock Jan Fat* v. *White,* 253 U.S. 454 (1920); *Sung* v. *McGrath,* 339 U.S. 33 (1950); *cf. Jordan* v. *De George,* 341 U.S. 223 (1951); *Kwong Hai Chew* v. *Colding,* 344 U.S. 590, 601 (1953), and so much we understand to be conceded by respondent.

In the *Sung* case, *supra,* the Court held, as a matter of statutory construction, that deportation proceedings must conform to the hearing requirements of the Administrative Procedure Act. One of the factors which the Court regarded as supporting this construction was that an exemption of deportation proceedings from the Act might well be unconstitutional. The Court stated (at 50, 51):

> "Indeed, to so construe the Immigration Act [i.e., so as to make the Administrative Procedure Act inapplicable] might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness, and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceed-

> ings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

(B) *Procedural due process is an expanding concept which* ***requires observance of "at least currently prevailing standards of impartiality."***

The "currently prevailing standards of impartiality" change, of course, with the times, and inevitably they become more fastidious as civilization advances. "Due process of law" is as old as Magna Charta, but procedures which today are considered indispensable are vastly more refined than those employed in medieval times. The concept of due process still retains the ability to expand, as indicated by contemporary developments in such matters as the admissibility of confessions, the right to representation by counsel, and the right to impartially-selected juries. The situation is summed up in *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949):

> "Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

Accordingly, it is not enough for the Government to urge that the deportation procedure herein was accepted before

the enactment of the Administrative Procedure Act. Procedures which passed muster in the frontier period of the administrative process are not necessarily valid today, any more than the crudities in criminal procedure which characterized the frontier period of the nation's history. What constitutes due process in deportation hearings can not be determined by reference to abstractions, nor apart from the standards which prevail in federal administrative agencies generally. The Administrative Procedure Act did not amend the Constitution, but if it embodies the current standards of impartiality and fairness for administrative proceedings, the quintessence of "what is deemed reasonable and right," then by constitutional compulsion deportation proceedings must conform to the Act's provisions.

(C) *The Administrative Procedure Act embodies the "currently prevailing standards of fairness" in its condemnation of commingling of functions.*

Not all procedural regulations establish standards of impartiality or fairness. Pre-trial, for example, is primarily a device for expedition and efficiency, and is not generally considered to be indispensable to fair play. The Administrative Procedure Act, however, is above every thing else designed to insure fairness in the administrative process. The Act is entitled "An Act to improve the administration of justice by prescribing fair administrative procedure," and the *Sung* opinion (at 36-45) amply documents the legislative history behind this Congressional purpose.

The Act, furthermore, is more than a loose collection of rules of procedure. It lays down general policies and a comprehensive scheme which constitute a basic charter for administrative justice. The Act is a sort of constitution governing the "statutes" which agencies may "enact" to formulate their procedures. Thus, section 5 of the Act

requires timely notice of agency hearings; it leaves to the agencies the prescribing of the number of days for notice and the methods of notification. This charter-like aspect of the Act was fully recognized by its sponsors:

> "The bill, as reported, is not a specification of the details of the administrative procedure, nor is it a codification of administrative law. Instead, out of a long consideration and in the light of the studies heretofore mentioned, there has been framed an outline of minimum basic essentials." (*Report of the Senate Committee on the Judiciary to Accompany S. 7*, Sen. Rep. 752, 79th Cong., 1st Sess., p. 7; *Senate Document 248, supra*, p. 193).
>
> "By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure." (*Id.*, p. 31; *Senate Document 248, supra*, p. 217).
>
> "The bill is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them while administrators are given a simple framework upon which to base such operations as are subject to the provisions of the bill." (*Report of the House Committee on the Judiciary on S. 7*, H. Rep. 1980, 79th Cong., 2d Sess., pp. 16-17; *Senate Document 248, supra*, pp. 250-251).
>
> "Although it (the Act) is brief, it is a comprehensive charter of private liberty, and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority."

(Foreword by the Chairman of the Senate Committee on the Judiciary, to *Administrative Procedure Act—Legislative History, Senate Document 248*, 79th Cong., 2d Sess., p. iii).

The Administrative Procedure Act, in its historic context, constitutes a legislative rather than judicial recognition that certain reforms, particularly those involving the separation of functions, are essential to elementary fairness in the administrative process under contemporary conditions. This legislative recognition was based on experience, not formulated in the abstract. It was made after more than ten years of exhaustive study and investigation by the legislative and executive branches (*Sung* case at 37-40; *Senate Report 752*, 79th Cong., 1st Session, p. 1; *House Report 1980*, 79th Cong., 2d Sess., p. 7), of a kind and scope which the courts are utterly unequipped to make. It would be irrational for the courts to reject as unfounded this legislative recognition of what is essential to due process in the administrative field.

Even without the legislative recognition, it should now be held in the light of experience and modern research that the due process clause requires separation of the adjudicative and prosecutorial functions in administrative proceedings. Such a holding, if it goes no further than the policies laid down in the Administrative Procedure Act, would still be far short of compelling an insulation comparable to that which applies to the judiciary, even though present-day administrative proceedings often involve issues more vital than many law suits. A hearing officer can neither be, nor appear to be, unbiased if he has investigative and prosecutorial functions in the same or a similar case, and if his employment and advancement are entirely at the mercy of the agency which is a party to the proceeding. It has been authoritatively observed that this natural psychologi-

cal predisposition is particularly pronounced in deportation proceedings:

> "The reason usually urged for separation of the investigating and quasi-judicial functions within an administrative organization is the human difficulty of ridding oneself of commitments on a question after having been engaged on one side of it. This consideration applies with more than ordinary force in deportation hearings. Inspectors, like other human beings, do not want their work to appear fruitless, and are reluctant to conclude that it should go for nothing." (*The Immigration and Naturalization Service, Report of the Secretary of Labor's Committee on Administrative Procedure* (1940), p. 79).
>
> "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible." *Id* at 82.
>
> "These types of commingling of functions of investigation with the function of deciding are thus plainly undesirable." *Report, Attorney General's Committee on Administrative Procedure*, 56 (1941). *Senate Document 8*, 77th Congress, 1st Session.
>
> " • • • the same men are obliged to serve both as prosecutors and judges. This not only undermines judicial fairness; it weakens public confidence in that fairness." *Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management*, 36-37 (1937).
>
> "One person to prosecute and judge, a person who through training, experience and present function has

acquired attitudes adverse to the accused party—such a person seems ill-qualified to pass upon rights so numerically significant and individually vital as the rights involved in deportation. Far from reflecting upon the Service or its personnel, such a statement is simply a recognition of a basic limitation on human nature. After all, the essential task of the Service is to detect and deport. It is no more surprising that its officers are not prepared to preside impartially than that the members of a police force are ill suited to sit in judgment on the suspects they arrest." *Deportation and Due Process*, 5 Stanford Law Review, July 1953, pp. 737-8.

See also: *Our Immigration Laws, A Continuing Affront to the Administrative Procedure Act*, 41 Georgetown Law Review 364 (1953); *Developments in the Law—Immigration and Nationality*, 66 Harvard Law Review at 693 (1953).

Prior to the Administrative Procedure Act the courts found commingling of functions in deportation cases "unfortunate and subject to criticism," *Palmer* v. *Ultimo*, 69 F. 2d 1, 2 (C.A. 7, 1934) *cert. denied*, 293 U.S. 570 (1934), a procedure to which it was "difficult * * * to adjust" *Ex parte Kwan So*, 211 Fed. 772, 773 (N.D. Cal., 1913). Judge Learned Hand observed in *U.S. ex rel. Iorio* v. *Day*, 34 F. 2d 920, 922 (C.A. 2, 1929):

"The record discloses a very lax regard for the fundamentals of a fair hearing. * * * the attitude of the examiner, the introduction of confused and voluminous evidence taken elsewhere, the strong indication that appellant was vaguely regarded as undesirable, and that deportation was thought the easiest way to get rid of him and to avoid the normal processes of the law—*all these warn us of the dangers inherent in a*

*system where prosecutor and judge are one and the ordinary rules which protect the accused are in abeyance.*" (Italics supplied)

Judicial decisions of this Court already foreshadow for acceptance as due process the principle of separation of functions. In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the personal pecuniary interest of the magistrate in the outcome of the trial was only one basis for the Court's finding of a denial of due process. Equally offensive was the fact that the magistrate's dual role as mayor supplied a separate official concern in the benefit his community would derive from imposition of a fine. (See at 532-534.) One of the reasons advanced by Mr. Justice Rutledge for condemning the Michigan one-man grand jury was that it combined in a "single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury." *Re Oliver*, 333 U.S. 257, 278 (1948). In *Morgan* v. *United States*, 304 U.S. 1, 22 (1937), one of the objectionable factors in the process of administrative decision was that the Secretary of Agriculture accepted, after ex parte consultation with subordinate officials, findings "prepared by the active prosecutors for the Government."

We urge, therefore, that failure to separate functions in deportation proceedings as required by section 5(c) of the Administrative Procedure Act, violates due process as that concept has evolved today.

(D) *Commingling of functions in deportation cases violates currently accepted standards of fairness.*

The courts below found that section 242(b) provides due process of law, although it varied from the Administrative Procedure Act (R. 22, 39). Implicit in their decisions is the finding that separation of functions is not required by currently prevailing standards of fairness.

To the contrary, is the conclusion reached in the *Report*

*of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome* (1953) which states at pages 161-162:

> "A striking phenomenon in the jurisprudence of our day has been the crystallization of concepts for fair dealing in the administrative process. These concepts have been formulated by scholars, by the legal profession, by official studies, by the courts, and in the legislatures. They have included a universal condemnation of the situation in which one official or group of officials acts as investigator, prosecutor, and judge. This practice has been characterized as obnoxious to elementary standards of fair procedure.
>
> "Those who have appraised the immigration process likewise have condemned its mixture of prosecuting and adjudicative functions. They have described it as a roadblock to impartial consideration. The Supreme Court said recently that the administrative deportation hearing is 'a perfect exemplification of the practices so universally condemned.' But the attainment of insulation between prosecution and adjudication has been resisted and is today not yet a reality. The deportation process, although it touches countless human lives, thus has lagged behind other aspects of administrative justice. The major burden of the testimony of the American Bar Association was to urge the application of the Administrative Procedure Act to deportation proceedings.
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> * * * * *
>
> "*The present hearing procedure in deportation and exclusion cases fails to conform to the now generally accepted standards for fair hearings.* The normal practice in both exclusion and deportation cases under the act of 1952, is to have the entire proceeding conducted

by a special inquiry officer who acts both as prosecutor and judge. Furthermore, officers normally performing investigating and prosecuting duties are authorized to conduct immigration hearings.

"Another major facet of the Administrative Procedure Act is the removal of hearing examiners from the supervision of officers performing prosecuting and investigative functions. This goal likewise is not fully met by current immigration practices. Even full-time hearing officers are subject to the immediate supervision of the district director of the Immigration and Naturalization Service in administrative arrangements at the local level, and to over-all policy supervision of the assistant commissioner in charge of the inspections and examinations division. Both of these officials are concerned with enforcement. Under such an arrangement the hearing officer inevitably will tend to tailor his determinations to the wishes of his superior officers, whose sphere of action encompasses enforcement duties."

All major agencies of the Government now follow section 5 of the Administrative Procedure Act except the Immigration Service. Included are the Interstate Commerce Commission, *Riss & Co.* v. *United States*, 341 U.S. 907 (1951); the Post Office Department, *Cates* v. *Haderlein*, 342 U.S. 804 (1951); the Federal Power Commission, *Colorado Interstate Gas Co.*, 1 Pike & Fischer Ad. Law 2d 309, 310 (1951); the Civil Service Commission, in its enforcement of the Hatch Act, *Matter of James J. Murphy*, 2 Pike & Fischer Ad. Law 2d 284 (1952); the Securities Exchange Commission, *Eastern Utilities Associates* v. *Securities Exchange Commission*, 162 F. 2d 385 (C. A. 1, 1947); the Civil Aeronautics Board, *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839 (C. A. D. C., 1950); the National Labor Relations Board, *National Labor Relations Board* v. *Stocker Mfg. Co.*,

185 F. 2d 451 (C. A. 3, 1950); the Federal Communications Commission, [see: *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F. 2d 298 (C. A. D. C. 1952)]; and the Federal Trade Commission, [see: *Luria Brothers & Co.*, 4 Pike & Fischer Ad. Law 2d 475 (1954)].

More cogent are the reasons for requiring separation of functions in a deportation proceeding where risks are greater, involving "loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1921). Here the evil of commingling, "if objectionable anywhere, would seem to be particularly so * * * ." *Sung* v. *McGrath*, 339 U.S. at 46. Here, if fair administrative procedure is to obtain in conformity with our present day concepts of due process, the prosecutor sitting as a judge, and the judge subject to the control of those who investigate and prosecute, cannot be tolerated.

## IV

### Deportation Upon this Record Offends the Ex Post Facto Prohibition

We recognize, in approaching the issue of *ex post facto* as applied to deportation, that "the slate is not clean." *Galvan* v. *Press*, 347 U.S. 522, 531 (1954). The slate was not clean, however, when this Court overturned a precedent of ninety-five years standing in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1937). This Court's reversals in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), *Jones* v. *Opelika*, 319 U.S. 103 (1943), *Board of Education* v. Barnette, 319 U.S. 624 (1943), *Smith* v. *Allright*, 321 U.S. 649 (1944), and *Girouard* v. *United States*, 328 U.S. 61 (1946)—to mention only a few of the 30 cases in this category,[4] all point to the view of Mr. Justice Holmes and Mr. Justice Brandeis that "no lapse of time or respectable ar-

[4] 21 involved constitutional issues. William O. Douglas, *An Almanac of Liberty*, p. 48 (1954).

ray of opinion shall make the Court hesitate to correct an unconstitutional assumption of power by the Courts of the United States." *Erie Railroad* v. *Tompkins, supra,* at p. 79. It is with this thought that we respectfully seek reconsideration of the *ex post facto* problem. We also regard most, if not all prior statements as *dicta* or decisions based upon *dicta*. Here, too, unlike *Galvan* v. *Press, supra,* and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593 (1952), the petitioner had no advance warning that his conduct would be considered a deportable offense. (See: Gov't Brief, *Galvan* v. *Press*, pp. 62-63).

Here, it is sought, not to jail petitioner for past misconduct for which he has paid his penalty, but to do much more—to perpetually deprive him of his right to live in the United States with his American wife and four American born children. Petitioner is to be sent into permanent exile for past misconduct which did not constitute a deportable offense in 1938 when committed (R. 56).

Violation of the Marihauna Act of 1937 did not become a deportable offense until June 28, 1940 when the Alien Registration Act of 1940 (54 Stat. 673) was enacted. That law specifically provided that it was inapplicable to "any act committed prior to the date of the enactment of this Act." Section 403(39) of the 1952 Immigration Act (66 Stat. 280) repealed this provision of the Alien Registration Act. At the same time, the 1952 Act in a broad savings clause preserved "any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect" unless otherwise specifically provided. (section 405, 66 Stat. 280; 8 U.S.C. 1101 note) Under the savings clause, petitioner's right to permanent residence is preserved [see: *Bertoldi* v. *McGrath*, 178 F. 2d 977, (C.A.D.C. 1949)] unless it is otherwise specifically provided. Section 241(d) of the 1952 Act [8 U.S.C. 1251(d)]

can be read consistently with the savings clause by giving it retroactive effect only to June 28, 1940, the date when marihauna violations became deportable offenses. We question whether it is specifically provided in the Act that those who had a non-deportable status under the Alien Registration Act of 1940 became deportable under the 1952 Act [See: *U.S. ex rel De Luca* v. *O'Rourke*, 213 F. 2d 759 (C.A. 8, 1954)]. In view of the penal nature of deportation statutes, the retroactive application here sought by the Government should not be favored. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948).

However, if it be concluded that petitioner is deportable by a 1952 statute for previously non-deportable conduct which occurred 15 years ago, then it is clear that petitioner was not forwarned like *Harisiades* or *Galvan*. As Mr. Justice Jackson noted in the *Harisiades* case, these aliens were "adequately forewarned both that their conduct was prohibited and of its consequences," 342 U.S. at 593. Both joined the Communist Party at a time when such membership was a deportable offense.

No such situation exists here. Here, without any forewarning, in 1952, it is sought to deport petitioner for non-deportable conduct in 1938. Can such arbitrary and despotic application of our deportation law be defended upon the ground that deportation is a civil proceeding? Is form rather than substance to be the controlling factor?

(A) *The ex post facto prohibition forbids retroactive civil legislation.*

Some foreign countries, like Norway, Mexico, Portugal and Brazil, have express constitutional provisions forbidding all retroactive laws. (II *Dodd, Modern Constitutions*, 141, 42, 175; I *ibid*, 153). Article 43 of the 1921 Constitution of the Irish Free State—a provision reaffirmed in its 1937 Constitution—likewise prohibits retroactive civil and criminal legislation.

In ordinary usage among laymen and lawyers in English speaking countries, the accepted meaning of *ex post facto* encompasses civil as well as criminal matters. *Oxford Universal English Dictionary; Webster's New International Dictionary; Funk and Wagnalls New Standard Dictionary; Osborn, A Concise Law Dictionary for Students and Practitioners (London); Byrnes, Law Dictionary; Aiyar, The Law Lexicon of British India; Bell, South African Legal Dictionary; Black's Law Dictionary; Bouvier, Law Dictionary.*

At common law, in England and in this country, the phrase *ex post facto* was utilized to denote civil matters. *Wilkinson* v. *Meyer*, 2 Raymond 1350, 1352; *Sir Francis Bacon, Elements of the Common Law* (1639), *Maxim 21*, pp. 74, 78; 1 *Sheppard's Touchstone* 63, 70, 73; 1 *Cooley's Blackstone*, 4th Ed. pp. 682, 726.

Legal scholars, including Professors William W. Crosskey, Breck McAllister, O. P. Field and B. T. DWitt, who have thoroughly investigated the intention of the framers of the Constitution and the views prevailing at the time, have all concurred that the *ex post facto* prohibition of Article 1, Section 9, was designed to cover civil matters.

Professor Crosskey in a chapter, entitled, "The True Meaning of the Ex Post Facto Clauses" (1 *Politics and the Constitution* 324) observes that the debates during the Constitutional Convention,[5] periodicals,[6] law books,[7] and

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[5] *Crosskey, ibid*, pp. 332-339.

[6] *Crosskey, ibid*, pp. 326-329, citing: The New Jersey Gazette, March 2, 1784; Freeman's Journal, September 7, 1785; Political Intelligencer and New Jersey Advertiser, January 4, 1786; The Massachusetts Centinel, February 11, 1786; The Independent Chronicle, May 31, 1787; The Massachusetts Centinel, November 28, 1787; The Virginia Independent Chronicle, March 19, 1788; The Columbian Herald, February 4, 1788.

[7] *Crosskey, ibid*, pp. 330-331, citing: Giles Jacob's *Law Dictionary* (1739); Sheppard, *Touchstone of Common Assurances* (7th Ed; London, 1820) I, 63, 67 and 68; II, 234, 250, 267, 372; Fearne, *An Essay on Contingent Remainders* (8th Ed; London, 1824), 274, 362; Powell, *An Essay Upon the Learning of Devises* (London, 1788), 113, 133, 134;

decided cases[8] antedating and immediately following the Constitutional Convention all gave *ex post facto* a civil connotation.

Writing in 15 *California Law Review* 269, 270 Prof. Breck McAllister of the University of Washington asserts:

> "Two writers after extensive examination of the records of the Constitutional Convention of 1787 and of the state ratifying conventions, have concluded that the phrase ex post facto was not used in the technical sense of a prohibition against criminal retroactive laws, but was intended to supplement the clause prohibiting the states from impairing the obligation of contracts, as a prohibition against all retroactive legislation. *The real mischief aimed at, it is pointed out, was retroactive civil legislation.*"

Prof. McAllister also advances the theory that *Calder* v. *Bull* incorrectly analyzed the problem because it was decided in 1798 and the records of the Constitutional Convention were not published until 1819. The two writings referred to by Prof. McAllister were articles by Prof. O. P. Field of the University of Indiana in 20 *Michigan Law Review* 315 (reprinted in 2 *Select Essays on the Constitutional Law* 1337) and by B. T. DeWitt in 15 *Political Science Quarterly* 96.

B. T. DeWitt in 15 *Political Science Quarterly* 96 at page 97 points out that:

> "It is equally manifest that the original intention of the convention in adopting Article 1, Section 9 that 'no bill of attainder or ex post facto law shall be

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Wooddeson, *A Systematical View of the Laws of England* (London, 1792), II, 641; Blackstone, I, 46.

[8] *Crosskey, ibid.*, pp. 330, 339-342, citing: *Wilkinson* v. *Meyer*, 2 Ld Raym 1350, 1352 (1724); *Turner* v. *Turner's Executrix*, 4 Call (Va) 234, 237 (1792); *Elliot's Executor* v. *Lyell*, 3 Call (Va) 268, 286 (1802); *Den* v. *Goldtrap*, 1 N. J. L. 315, 319 (1795).

passed' was to forbid the impairment of the obligations of contracts by national legislation."

DeWitt further relates at page 103 that "Blackstone uses *ex post facto* more frequently of matters relating to property rights and civil proceedings than of matters relating to crimes and criminal proceedings" (Citing Cooley's Blackstone Volume 1, Book II, Ch. 20, pp. 682, 701, par. 308, 334; Ch. 22, p. 726, par. 368).

In the debates during the Constitutional Convention, George Mason remarked:

> "* * * I conceive that, according to the common acceptation of the word, *ex post facto* laws and retrospective laws are synonymous terms." III *Elliot's Debates* 479.[9]

*Story on the Constitution* (5th Ed) states at pp. 218-219:

> "The terms *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws or laws governing or controlling past transactions, whether they are of a civil or criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States. As an original question, the argument would be entitled to grave consideration * * *".

There are Supreme Court *dicta* and cases relying upon *dicta* which say that the *ex post facto* provisions are inapplicable on the ground that the prohibition applies only to criminal statutes. These cases will be analyzed below.

*Calder* v. *Bull*, 3 Dall 386 (1798), was the first *ex post facto* decision of the Supreme Court. It upheld the right

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[9] For the background which provoked this discussion, see *Crosskey, ibid.*, pp. 332-339.

of the Connecticut legislature to set aside a court decree disallowing the probate of a will. The resolution of the legislature granted a new trial. In the course of its opinion the Supreme Court stated that the *ex post facto* prohibition was confined to criminal legislation. It may be noted that in 1798, is was assumed by the majority of the Court that a bill of attainder likewise applied only to criminal matters and that the two phrases, bill of attainder and *ex post facto*, enumerated criminal prohibitions exclusively.

[Note Mr. Justice Johnson's remarks, at 2 Peters 686 *infra*, and compare *Lovett* v. *United States*, 328 U. S. 303 (1946)]

Samuel Corwin in his biography, *John Marshall and the Constitution*, describes Chief Justice Marshall's displeasure with the decision in *Calder* v. *Bull* and states at p. 150:

> "The decision roused sharp criticism and the judges themselves seem fairly to repent of it even in handing it down."

In *Fletcher* v. *Peck*, 6 Cranch 87 (1810) at 138-139, Chief Justice Marshall clearly indicated that he considered both the bill of attainder and *ex post facto* prohibition applicable to civil legislation. He there stated:

> "This rescinding act would have the effect of an *ex post facto* law. . . . This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant."

And, in a special appendix to *Satterlee* v. *Matthewson*, 2 Peters 414 (1829) at p. 681 (7 Law Ed. 561) Mr. Justice Johnson[10] described the language in *Calder* v. *Bull* as dicta and devoted four pages to establish that the *ex post facto*

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[10] See also: *Justice William Johnson* by Donald G. Morgan (1954) at pp. 223-226.

prohibition applied to civil proceedings. He stated at page 682:

> "I then have a right to deny that the construction intimated by three judges in the case of Calder v. Bull is entitled to the weight of an adjudication. Nor is it immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.
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> • • • • •
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> "That the phrase 'ex post facto' is not confined in its ordinary signification to criminal law or criminal statutes admits of positive demonstration."

Mr. Justice Johnson then traced the common law history of *ex post facto* and gave instances where at common law it had been used in connection with civil matters.

*See also:*

*Ogden* v. *Saunders*, 12 Wheat. 213, 286 (1827);
*Dartmouth College* v. *Woodward*, 4 Wheat. 518, 578, Note 7 (1819).

The real mischief in *ex post facto* legislation is the unfairness of its retroactive provisions. It is just as unfair to punish someone retrospectively and *nunc pro tunc* for past conduct criminally as it is to punish him under our civil laws. It is therefore not surprising that the Supreme Court itself declined to follow *Calder* v. *Bull* after the Civil War when three cases arose.

The first case was *Cummings* v. *Missouri*, 4 Wall. 277 (1868), which involved a provision of the Missouri Constitution of 1865 to the effect that no person should practice as an attorney or clergyman unless he took a prescribed oath that he had not engaged in hostility against or been disloyal to the United States. Cummings was a Catholic

priest who was convicted by the Missouri court of preaching without having taken the prescribed oath. The court specifically held that the requirement of a loyalty oath as to past conduct was *ex post facto* (4 Wall 326, 377) as well as a bill of attainder (4 Wall 323, 377). In so doing it specifically held that these constitutional provisions applied to civil proceedings (4 Wall 326, 327).

In the second case, *Ex Parte Garland*, 4 Wall 333 (1867), there was involved the constitutionality of a Federal statute which required an individual to swear as to his past loyalty in order to practice as an attorney in the Federal courts. Garland, a member of the Confederate Congress, applied to the Supreme Court for permission to continue to practice law without taking the oath. The Court held that this provision was unconstitutional both upon the ground that it was a bill of attainder (4 Wall 377) and *ex post facto* (4 Wall 377, 378).

In both cases, dissenting opinions were recorded (4 Wall 333, 382) on the ground that under *Calder* v. *Bull ex post facto was confined to criminal proceedings* (4 Wall 390, 391).

In the third case, *Pierce* v. *Carskadon*, 16 Wall 234, 239 (1873), a statute required the taking of a loyalty oath to secure a rehearing in civil litigation. The Court relying upon the *Cummings* and *Garland* cases held the law unconstitutional.

There can be little doubt that these three court decisions which followed *Calder* v. *Bull* were square rulings inconsistent with the ruling in that early case. The *Cummings* and *Garland* cases, if recognized today, overrule the decision in *Calder* v. *Bull*. And, in *Lovett* v. *United States*, 328 U. S. 303 (1946) and *Garner* v. *Board of Public Works*, 341 U. S. 716, (1951) decisions on Article 1, Section 9 (3) of the Constitution, this Court specifically acknowledged that the *Cummings* and *Garland* cases represented a correct state-

ment of the law today. The *Lovett* case, it is true, dealt exclusively with bills of attainder, but significantly, the court held that the constitutional prohibition Article 1, Section 9 (3) related to civil matters. A bill of attainder is a legislative act which inflicts punishment and it necessarily operates on past facts. For that reason the early cases like the *Cummings* and *Garland* cases made no distinction between *ex post facto* and *bills of attainder*. The reaffirmation of the *Cummings* and *Garland* cases in the *Lovett* and *Garner* cases, clearly indicates that the Supreme Court regards that both prohibitions relate to civil matters.

In *The Settler Within Our Gates*, by Boudin, 26 N.Y.U. Law Review 634 (1951) and 52 *Yale Law Journal*, 116, 117, the Supreme Court *dicta*, usually relied upon for restricting *ex post facto* to criminal cases are analyzed.

It will be observed that these authorities were *dicta* and unnecessary to the case holdings.

In *Johannessen* v. *United States*, 225 U. S. 227 (1912), denaturalization because of fraud and not deportation was involved. Taking something away from a man to which he was never entitled does not involve *ex post facto* legislation. In like manner, application of the 1917 Immigration Act to aliens who entered illegally prior to its effective date and who never had legal permanent residence, merely deprives them of something to which they were never entitled and is not *ex post facto*. *Lauria* v. *United States*, 271 Fed. 261, (C.A. 2, 1921) *cert. denied*, 257 U. S. 635; *U. S. ex rel. David* v. *Tod*, 289 Fed. 60 (C.A. 2, 1923); *Sit Sing Kum* v. *United Stat* 277 Fed. 191 (C.A. 2, 1921); *Mon Singh* v. *White*, 274 Fed. 513 (C.A. 9, 1921); *Hughes* v. *Tropello*, 296 Fed. 306 (C.A. 3, 1924); *Ono* v. *United States*, 267 Fed. 359 (C.A. 9, 1920).

*Bugajewitz* v. *Adams*, 228 U. S. 585 (1913), involved deportation of an alien *presently* practicing prostitution. No *ex-post facto* question was presented. In *Mahler* v. *Eby*, 264 U. S. 32 (1924), the case was remanded because the Secre-

tary of Labor failed to make a finding that the alien was presently undesirable. Deportation of an alien held to be undesirable today involves no *ex post facto* feature.

It will be observed that in *Mahler* v. *Eby*, *supra*, both the court and the government relied upon *Hawker* v. *New York*, 170 U. S. 189 (1898) for the proposition that the statute did not contravene the *ex post facto* prohibition (Gov't brief p. 5). In addition, it may be noticed that counsel for the alien completely abandoned the argument that the statute was *ex post facto* in his brief before this court.

The *dicta* in the foregoing cases cannot be regarded as controlling. In reviewing these authorities 52 *Yale Law Journal* 116 concludes:

> "Although some cases have said that a criminal penalty must be involved, the weight of authority, relying on *Ex Parte Garland* and *Cummings* v. *Missouri*, has asserted the more reasonable view that mere punishment of whatever nature is the criterion."

*Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), relying upon the *dicta* of foregoing cases refused to reconsider the *ex post facto* prohibition upon the grounds that the aliens concerned had been forewarned, and Congress had determined to deport past members of the Communist Party because of the difficulty in selecting true repenters. (342 U.S. at 593 and 595).

*Galvan* v. *Press*, 347 U.S. 522 (1954), like *Harisiades* involved an alien who was forewarned. He was a member of the Communist Party from 1944 to 1946 when past and present membership in a subversive organization was a deportable offense. The Internal Security Act of 1950 changed rules of evidence, dispensing with the necessity of proving the character of the Communist Party. Such change affected no substantial rights, and like retroactive changes in rules of procedure, *Beazell* v. *Ohio*, 269 U.S. 167 (1925), may properly be sustained on that ground.

Here, however, there was no deportable offense at the time of commission. Here, there was no forewarning. Here, retroactively, a sanction is being imposed far greater than the criminal penalty which petitioner paid in 1938.

(B) *Deportation involves punishment within the ex post facto prohibition.*

Although it has frequently been stated that *ex post facto* relates solely to criminal matters, many of our leading writers on the subject recognize the inaccuracy of such statements.

*Burdick*, in *The Law of the American Constitution*, states at page 449:

> "A statute may be ex post facto though not penal in form if its sole purpose is to inflict a penalty upon persons for past acts."

1 *Cooley's Constitutional Limitations* (Eighth Ed.) 544-545 recognizes that:

> "It is not essential however, in oder to render a law invalid on these grounds, that it should expressly assume the action to which it relates to be criminal; or provide for punishment on that ground. * * * if it deprives a party of any valuable right—like the right to follow a lawful calling—for acts which were innocent, or at least not punishable by law when committed, the law will be ex post facto—in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal."

*Rottschaefer, American Constitution Law*, at 769, 770 declares:

> "It has been stated that punishment also includes depriving one of his civil or political rights."

In *Calder* v. *Bull, supra*, Mr. Justice Chase acknowledged that *ex post facto* encompassed legislative judgments which

"inflicted punishments, where the party was not by law liable to any punishment." And in footnote 3 of his opinion, he cited the banishments of Lord Clarendon and of the Bishop of Atterbury.

In *Cummings* v. *Missouri* and *Ex Parte Garland*, *supra*, the Supreme Court held the deprivation of the right to practice one's profession involved punishment. In the *Cummings* case, the court said that (4 Wall. 320 332, 324, 325):

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
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> "'*Some punishments*', says *Blackstone*, '*consist of exile or banishment, by abjuration of the realm or transportation, others in loss of liberty. . . .*'
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> • • • • •
>
> "The theory upon which our political institutions rest is that all men have certain inalienable rights—that among them are life, liberty and the pursuit of happiness. . . . Any deprivation or suspension of any of these rights for past misconduct is punishment, and can be in no otherwise defined.
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> • • • • •
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> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the right of the citizen should be secure against deprivation for past misconduct by legislative enactment, under any form however disguised." (Italics supplied).

In *Bridges* v. *Wixon*, 326 U.S. 135 (1945), Mr. Justice Douglas speaking for the majority stated:

"It must be remembered that although deportation technically is not criminal punishment (*Johannessen* v. *United States*, 225 U.S. 227, 242; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Makler* v. *Eby*, 264 U. S. 32, 39) it may nevertheless visit as a great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. *Cummings* v. *Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333. As stated by Justice Brandeis speaking for the Court in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deportation may result in the loss 'of all 'hat makes life worth living' ".

* * * * *

"Here the liberty of an individual is at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. *That deportation is a penalty—at times a most serious one—cannot be doubted.*"

More recently in *Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947), Mr. Justice Douglas stated that:

"Deportation can be the equivalent of banishment or exile. . . . The stakes are indeed high and momentous for the alien who has acquired residence here."

See also: *Fong Haw Tan* v. *Phelan*, 333 U. S. 10 (1948).

In *Ng Fung Ho* v. *White*, 259 U. S. 276, 285 (1921) Mr. Justice Brandeis said that deportation

"may result also in loss of both property and life; or of all that makes life worth living."

*Wallis* v. *Tecchio*, 65 F. 2d 250, 252 (C. A. 5, 1933) states that:

> "The statute in its effect upon the individual must be classified as penal. . . . We regard forfeiture for misconduct of the privilege of an existing residence in the United States as a penalty."

In U. S. *ex rel Klonis* v. *Davis*, 13 F. 2d 630 (C. A. 2, 1926) it was again said:

> "However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone."

In *Sung* v. *McGrath*, 339 U.S. 33 (1950), Mr. Justice Jackson declared, that:

> "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."

Chief Justice Vinson, speaking for the Court, stated in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951),

> "The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. *Such forfeiture is a penalty. Fong Haw Tan* v. *Phelan* 333 U. S. 6, 92 L. Ed. 433, 68 S. Ct. 374, supra." (Italics supplied).

Can there be any doubt that under the foregoing authorities that the deportation of petitioner who came here as a baby at the age of 8 months would be a penalty and punishment? Would not petitioner prefer being sent to jail for another year under *ex post facto* criminal legislation, rather than being punished *ex post facto* by perpetual exile from his family, his home, his job and the land where he has

resided for over forty years? Of what value is it to surround petitioner with constitutional guarantees of due process if he may be summarily and arbitrarily deported under retrospective legislation?

The provisions of the Constitution, said Mr. Justice Holmes: "are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States*, 233 U. S. 604, 610 (1914).

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *Missouri*, 4 Wall 329 (1867).
>
> "Nothing is more certain in modern society than the prinicple that there are no absolutes, that a name, a phrase, a standard, has meaning only when associated with the considerations which gave birth to the nomenclature." *Dennis et al.* v. *United States*, 341 U. S. at 508 (1951).
>
> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J. dissenting in *Hude* v. *United States*, 225 U. S. 347 at 391 (1912).

We seek to provoke further analysis of the *ex post facto* problem, herein, because we believe that reliance upon the erroneous *dicta* of the past should be replaced by an evaluation of the true meaning of *ex post facto* as intended by the constitutional draftsmen. That evaluation will show that historically, the *ex post facto* prohibition was designed to cover civil matters and, therefore, should encompass the instant case. However, even if retroactive punishment be necessary for invocation of the pro-

hibition, realistically, considering substance rather than form, exile and banishment is one of the severest punishments which can be visited retroactively or otherwise upon an individual. We submit that a reconsideration of the problem here posed leads inevitably to the conclusion that the statute herein offends the *ex post facto* prohibition of the Constitution.

## Conclusion

Petitioner has been ordered deported after prejudgment of his case, at a hearing, where the impartiality of the hearing officer was influenced by newspaper headlines inspired by his superiors. In addition, the hearing officer, a prosecuting judge, was subject to the control of superiors who engaged in investigative and prosecuting functions, contrary to the applicable provisions of the Administrative Procedure Act and currently prevailing standards of fairness. This was the type of hearing accorded to petitioner, resident here for 43 years since the age of 8 months, to determine whether he be exiled or permitted to remain here with his American wife and four American born children. This was the background for punishing petitioner in 1953 by *ex post facto* legislation for a non-deportable offense committed more than fifteen years ago.

If the fundamental principles of fairness are to govern our laws, neither the hearing, nor the legislative enactment involved herein can be allowed to stand.

Respectfully submitted,

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## APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

*Article I, Section 9, Clause 3, of the Constitution* provides:

> "No bill of attainder or ex post facto law shall be passed."

*The Immigration and Nationality Act of 1952*, 66 Stat. 163 *et seq.* provides in pertinent part:

Section 241, 66 Stat. 204, 8 U. S. C. 1251:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;
>
> * * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

Section 242(b), 66 Stat. 209, 8 U. S. C. 1252:

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceedings, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a de-

termination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. • • •

Section 101(b)(4), 66 Stat. 171, 8 U. S. C. 1101(b)(4):

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Section 244, 66 Stat. 214, 8 U. S. C. 1254:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

• • • • •

(5) is deportable under paragraph • • • (11) • • • of section 241(a) for an act committed or status acquired subsequent to such entry into the United States • • •; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has

not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

Section 403, 66 Stat. 279:

(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(47) The paragraph headed "General provisions—Department of Justice" in Chapter III of the Supplemental Appropriation Act, 1951 (Public Law 843, Eighty-first Congress);

Section 405, 66 Stat. 280:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing at the time this Act shall take

effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *"

*The Administrative Procedure Act*, 60 Stat. 237 *et seq.* provides in pertinent part:

Section 5(c), 60 Stat. 240, 5 U. S. C. 1004(c):

"* * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

Section 7, 60 Stat. 241, 5 U. S. C. 1006:

"In hearings which section 4 or 5 requires to be conducted pursuant to this section —

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole

or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. * * *

Section 12, 60 Stat. 244, 5 U. S. C. 1011:

"* * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. * * *"

*The Act of September 27, 1950 (Supplemental Appropriations Act of 1951)*, 64 Stat. 1044, 1048 (8 U. S. C. 155a), provides:

Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U. S. C. 1004, 1006, 1007).

*Code of Federal Regulations*, 8 C. F. R., § 242.53(f) [1952 Ed.] provides as follows:

"*Assignment of examining officer in addition to special inquiry officer; duties of examining officer.* Prior to the commencement of a hearing, or during the course of a hearing upon the request of the special inquiry officer presiding at such hearing, the district director or the officer in charge having administrative jurisdiction over the place where the proceedings are pending, in his discretion, may assign an immigration officer to act at the hearing as the examining officer. The examining officer shall in such case conduct any required interrogation of the respondent and of the witnesses in behalf of the Government, examine or cross-examine the respondent's witnesses and present evidence bearing upon the

question whether the respondent is subject to deportation. Except as provided in §§ 242.74 and 242.75, he shall lodge such additional charges as he may find to be applicable and, if the respondent has applied for relief from deportation, inquire thoroughly into the respondent's eligibility for relief requested, and develop such other information as may be pertinent to the proper disposition of the case. The assignment of an examining officer shall not impair the authority conferred by the Immigration and Nationality Act or this chapter upon the special inquiry officer presiding at such hearing."

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## APPENDIX B

For Immediate Release, Tuesday, December 30, 1954

DEPARTMENT OF JUSTICE

Attorney General James P. McGranery announced today that Carlos Marcello of Miami, Florida, and Jefferson Parish, Louisiana, has been arrested on a deportation warrant by the Immigration and Naturalization Service.

The arrest in New Orleans was the first major deportation move undertaken since the new Immigration and Nationality Act became effective December 24, 1952. The action was another step in the Attorney General's program of denaturalization and/or deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities.

Marcello, born February 6, 1910, in Tunis, Africa, entered the United States for permanent residence October 7, 1910, at New Orleans.

He allegedly is engaged in large-scale slot machine operations and other gambling activities in Louisiana.

The deportation warrant was based on his conviction in

1938 for violation of the Marijuana Act. Such a conviction is a deportable offense under the new Immigration and Nationality Act.

The action follows lengthy investigations by both the Federal Bureau of Investigation and the Immigration and Naturalization Service. His conviction under the Marijuana Act was one of only two in his checkered career. The other case in which he was convicted was under Louisiana State law, the conviction being for assault and robbery, and on May 13, 1930, he was sentenced to serve a term of 9 to 14 years in the Louisiana State Penitentiary. The Governor of Louisiana gave him a full pardon for this crime July 16, 1935.

Marcello served a year and a day after his conviction under the Marijuana Act.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1954**

# No. 145

CARLOS MARCELLO,

*Petitioner,*

*vs.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY BRIEF

1. *Trial by newspapers.* Respondent contends that the Attorney General's press release was merely "a statement of what was evident from the statute itself, that the 1952 Act made" petitioner's conviction a ground for deportation (Brief, p. 12).

This contention overlooks the full text of the press release and more important, its effect in foreclosing a fair hearing. The press release did more than announce that Marcello was deportable under the 1952 Act—a public statement

*guage some of the fundamental principles of due process* which shall be granted to aliens in deportation proceedings. It provides that an immigration officer shall not act as the special inquiry officer under this section in any case in which he has engaged in investigative or prosecuting functions. The language of this subsection puts into the positive law some of the provisions as to the conduct of the hearings which are contained in sections 5, 7 and 8 of the Administrative Procedure Act.

"As drafted, apparently in view of the liberal provisions of this section, *this subsection specifically provides that the Administrative Procedure Act shall not apply to deportation proceedings.* This provision carries forward the provisions of Chapter III of the Act of September 27, 1950 (P. L. 843, 81st Congress), excepting deportation provisions from the application of sections 5, 7, and 8 of the Administrative Procedure Act." (Italics supplied)

As finally drafted section 242(b) [Main Brief, p. 59] sets forth what immigration regulation "shall include." Obviously Congress did not attempt to spell out an all inclusive set of regulations, but merely minimum requirements. These provisions, therefore, cannot be utilized to say that the Administrative Procedure Act was thereby repealed.

As originally proposed by the Immigration Service and by Congress in section 242(b) of S. 3455, S. 716 and H. R. 2379, the Administrative Procedure Act was specifically repealed (Main Brief, pp. 17-18). Thereafter the specific repeal was removed. In view of section 12 of the Administrative Procedure Act and Congressional awareness of the necessity of an express repeal (Main Brief, p. 15), Con-

gress can hardly have removed the specific repeal because it was superfluous. The removal of the specific repeal was obviously intended, as Congressman Walter noted, to "reinstate" the Administrative Procedure Act; as Senator McCarran insisted to make the Administrative Procedure Act "prevail," (Main Brief, pp. 19, 20) and as the Conference Report (H. R. 2096, 82nd Congress) acknowledged to bring the bill "within the framework and the pattern of the Administrative Procedure Act" (Gov't Brief, p. 30).

(b) *Section 101(b)(4).* Respondent contends that section 101(b)(4) expressly repeals the Administrative Procedure Act (Brief, p. 25, footnote 3). Section 101(b)(4) merely authorizes the Attorney General to specify the supervision and duties of a special inquiry officer *not inconsistent with this Act.* Therefore, if the Act repealed the Supplemental Appropriation Act granting exemption from the Administrative Procedure Act, as it did in section 403(a)(47), and if it reinstated the Administrative Procedure Act as we contend, then section 101(b)(4) is immaterial. It must be consistent with the 1952 Immigration Act wherein the Administrative Procedure Act prevails.

(c) *Committee Reports.* As noted by respondent (Brief, p. 27, footnote 4), H. Rep. 1365, 82nd Congress, states that "the bill declares that the prescribed deportation proceedings shall be the sole and exclusive procedure for determining the deportability of any alien, *notwithstanding the provisions of any other law.* This was what the earlier bills, S. 3455, S. 716 and H. R. 2379 declared. It was not what the final draft of the Walter-McCarran Act provided in view of the removal of the phrase, "Notwithstanding any other laws, including the Act of June 11, 1946 (60 Stat. 237)." Moreover, it is difficult to explain away the comment of the Conference Report (H. R. 2096, 82nd Congress, 2nd Session, p. 127). This was the last report on the bill. It

emphasized that the deportation procedures "remain within the framework and the pattern of the Administrative Procedure Act." The pattern and framework of the Administrative Procedure Act require hearing officers who are not subject to superiors (other than the agency head) who investigate or prosecute. If the Conference Report is accurate, the Administrative Procedure Act prevails and is not repealed by section 242(b) or 101(b)(4).

(d) *The President's Commission on Immigration and Naturalization.* In its report *Whom We Shall Welcome* (1953, pp. 159-160) the President's Commission on Immigration and Naturalization comments that the apparent purpose of sections 242(b) and 101(b)(4) "was to establish an exemption from the procedural requirements of the Administrative Procedure Act without specifically mentioning that statute." It was in view of this "apparent purpose" that "responsible criticism" of the 1952 Act suggested that section 242(b) was contrary to the Administrative Procedure Act (Gov't Brief, pp. 32-33). However, this responsible criticism failed to analyze the effect of section 12 of the Administrative Procedure Act, the evolution of section 242(b) from an express repeal of the Administrative Procedure Act to an ambiguous implied repeal at best, and whether an "apparent purpose" of Congress was enough to effect such repeal.

(e) *Section 12 of the Administrative Procedure Act.*

Few cases have analyzed the effect of section 12 of the Administrative Procedure Act. None of the cases cited by respondent (Brief, p. 25) even mention this section.

In the Attorney General's comments on the Administrative Procedure Act (Senate Document 248, 79th Congress, 2d Session, p. 231), it is said:

> "* * * the act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary."

We submit that neither section 242 (b) nor 101 (b) (4) of the Immigration Act clearly provides that special inquiry officers may be subject to the control of superiors who are investigators and prosecutors.

A helpful analysis of section 12 is set forth in *Nyon* v. *Dulles*, 122 F. Supp. 709 (Dist. of Col., 1954). In holding that the McCarran-Walter Act did not repeal the Declaratory Judgment statute, it was said:

> "The object and intent of Congress is enacting this beneficent and progressive legislation (the A.P.A.) is strongly emphasized by a unique and unusual expression found in the last section of the statute, 5 U.S.C.A., § 1011:
>
> "'No subsequent legislation shall be held to supersede or modify the provisions of this Chapter except to the extent that such legislation shall do so expressly.'
>
> "No intent on the part of Congress is discernible to repeal *pro tanto* the Declaratory Judgment Act of 1934, or to limit the Administrative Procedure Act. It is to be assumed that if Congress had intended to do so, it would not have accomplished this result in such an equivocal and indirect manner. Again, we must bear in mind the admonition contained in the Administrative Procedure Act that no subsequent legislation should be held to supersede or modify its

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---

## REPLY BRIEF

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*Of Counsel.*

which is not appropriate for an agency which is scheduled to accord an alien a fair hearing. It announced that (Appendix C., Resp. Brief):

1. The "deportation move" against Marcello "was another step in the Attorney General's program of * * * deportation of undesirable persons of foreign birth *who are engaged in racketeering or other criminal activities.*"

2. Marcello "allegedly is engaged in large scale slot machine operations and other gambling activities in Louisiana."

3. Marcello's "conviction under the Marijuana Act was one of only two in *his checkered career.*" (Reference was specifically made to a 1930 assault charge for which he was pardoned.)

4. Marcello's arrest "follows lengthy investigations by both the Federal Bureau of Investigation and the Immigration and Naturalization Service."

No evidence was introduced in the immigration hearing to show that Marcello is or was a racketeer or that he is presently engaged in gambling activities in Louisiana nor that he had a "checkered career."

A more inflammatory press release can hardly be imagined. It produced the headlines mentioned in our main brief at pages 7 to 9. The headlines produced by this press release on December 30 and 31, 1952, on page one of the New Orleans Item and the New Orleans States with pictures of Marcello read as follows (Immigration File, Exhibit 7):

> "Arrest Vice King Marcello for U. S. Exile" (New Orleans States; Resp. No. 1.)
>
> "Arrest Marcello for Deportation—Mobster freed on $5,000 bond" (The article describes Marcello as the number one mobster in Louisiana. New Orleans Item; Resp. No. 2)

On December 31, 1952 the New Orleans Item (Resp. No. 5, in Exhibit 7 of the Immigration File) stated:

> "But federal law enforcement agencies—and many have figured in the background of this case—are sure that the closing scene will see Marcello aboard a ship or plane for the Italy he has never seen".

On January 6, 1953, the New Orleans Item (Resp. No. 6) stated:

> "Immigration officials predict that Marcello will lose".

Here the prosecutor himself, the hearing officer's superior, fed the press with allegations which no self restrained press ought to publish in anticipation of a hearing. See *Stroble* v. *California*, 343 U. S. 181, 201 (1952). Here, Marcello was "prejudged guilty, and the trial was but a legal gesture to register a verdict already dictated by the press and public opinion which it generated." *Shepherd* v. *Florida*, 341 U. S. 50, 51 (1950).

Canon 20 of the American Bar Association's Canons of Professional Ethics generally condemns newspaper publications by a lawyer as to pending or anticipated litigation as will interfere with a fair trial or otherwise prejudice the administration of justice. See also: Address of Hon. Herbert Brownell, Jr., on September 24, 1954, entitled "Fair Trial with a Free Press," before the Federal Bar Association.

Marcello was entitled to a fair deportation hearing. The fairness of his hearing was interfered with by the release of an inflammatory statement to the press in advance of the hearing by the hearing officer's superior—a statement which was necessarily more influential upon the hearing officer than it would be upon a juror. Moreover, as we will show,

the press release admittedly influenced the Board of Immigration Appeals.

2. *Prejudgment.* Respondent asserts that there is no allegation that the Board of Immigration Appeals was influenced by the Attorney General or by his press release (Brief, p. 12). However, it is acknowledged that the Board's refusal to grant suspension of deportation (as its opinion reveals) was influenced by newspaper clippings. The Board's opinion states as one of the bases for denying suspension (R. 66):

> "As against any evidence he (Marcello) may present, there are * * * clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, 'number one mobster in Louisiana,' etc;"

The immigration transcript which is lodged with the Court distinctly shows at page 10 of the minutes of hearing that the newspaper clippings were offered solely to show prejudgment. At page 24 of the immigration minutes the following occurred:

> "SPECIAL INQUIRY OFFICER TO COUNSEL:
>
> "The newspaper clippings, Mr. Orchard, are, of course, hearsay. Actually as to their admissibility, they are inadmissible on that ground. I have no other reasons to object to their admission.
>
> By Counsel:
>
> " * * * they are offered for the purpose of showing that it was available information to you and that in the natural course of events that you probably read Mr. McGranary's press statement, and I think for that reason they are admissible."

By Special Inquiry Officer:

"They will be accepted on that ground in connection with your objection of this proceeding, and they will be marked collectively as Exhibit No. 7. * * *"

Thus, the newspaper clippings were offered for the limited purpose of showing prejudgment and not as proof of their contents. The Board of Immigration Appeals, however, utilized them as proof that Marcello was a racketeer. The Attorney General's press statement produced news stories which became affirmative evidence in the minds of the Board, influencing and controlling their judgment. Here, the record—the Board's opinion clearly and beyond a doubt shows the prejudgment condemned by this Court in *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

3. *The Administrative Procedure Act.*

(a) *Section 242(b).* Respondent acknowledges that provision for the conduct of hearings before a special inquiry officer alone does not exempt the Immigration Service from Section 5(c) of the Administrative Procedure Act (Brief p. 20). It is said, however, that Section 242(b) of the Immigration Act reveals a Congressional purpose to afford the exemption because the detailed procedure therein would be superfluous if the Administrative Procedure Act applied (Brief, pp. 15, 21, 24, 30).

We submit that Section 242(b) in its enumeration of what regulations should prescribe was originally intended to spell out what due process required—provisions obviously superfluous.

When S. 3455 was introduced in the 81st Congress, the Immigration Service was dissatisfied with the vagueness of Section 242(b). In a report on this section (on file in the Supreme Court Library), the Immigration Service stated:

"While the Service has no objection to the purposes of subsection (b), the wording of the subsection appears to be objectionable in many respects. For instance, it is provided that the proceedings 'shall be appropriate to the case and just to the party affected.' It also provides for a written notice to the alien 'in sufficient time' and that he shall be informed of the charges against him 'in sufficient detail' so that he will be able to prepare his defense. It is obvious that such vague terminology will permit contentions that provisions are not 'appropriate to the case' or 'just to the party affected,' and that notice has not been given 'in sufficient time' and that the charges have not been described 'in sufficient detail.' The possibilities of dilatory and repetitious litigation occasioned by the use of such indefinite terminology are readily apparent. The Service believes that that part of subsection (b) *preceding the last sentence* thereof would accomplish the same objectives as the subsection seeks to obtain and that at the same time be far more satisfactory to the Service if it were amended to read as follows:

"'(b) A final order or deportation in any case shall be made by the Commissioner only upon a record made in a proceeding before a special inquiry officer, at which the alien shall be present. Such proceeding shall be in accordance with such regulations as the Commissioner shall prescribe. Such regulations shall include as *minimum requirements* that:

"'(1) The alien shall have notice of the nature of the charge against him and of the time and place at which the proceeding will be held;

"'(2) The alien shall have the privilege of being

represented by counsel of his choice at no expense to the government:

"'(3) The alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government; and

"'(4) No decision shall be valid unless it is based upon probative evidence.

* * * * *

"'Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or any other law or treaty, the decision of the Commissioner shall be final.'"

Thus, it will be observed that the Immigration Service recommended the foregoing as minimum requirements to overcome the vagueness of section 242(b) of S. 3455. Thereafter S. 716 was introduced in the 82nd Congress. In its comments on S. 716, dated February 12, 1951, and filed with the Supreme Court Library, the Immigration Service recognized that section 242(b) contained provisions required by due process. It stated that it was the language *in section 242(b)* "Notwithstanding any other law including the Act of June 11, 1946," which expressly superseded the Administrative Procedure Act. These comments state:

"*Subsection (b).* This subsection relates to the conduct of deportation proceedings and the making of the decision in such cases. *It spells out in express lan-*

provisions except to the extent that such legislation shall do so expressly.

"The court is, therefore, of the opinion that the 1952 Act has not repealed or modified either the Declaratory Judgment Act or the Administrative Procedure Act, and that, therefore, this action lies."

See also: *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3, 1950).

We submit that the principle of the *Ngow* case is applicable here. Congress at first provided for an express repeal of the Administrative Procedure Act in section 242(b). It then removed it. In view of the admonition of section 12, this can only be interpreted as an intention to conform to the Administrative Procedure Act. Had Congress intended a repeal, it would not have utilized the equivocal and indirect method advocated by respondent. The removal of the express repeal points in only one direction—the apparent purpose of Congress to abide by the Administrative Procedure Act.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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## SUPPLEMENTAL BRIEF

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This supplemental brief is submitted pursuant to the suggestion made to counsel during oral argument, by Mr. Justice Frankfurter. It relates solely to the removal of the Administrative Procedure Act exemption from the drafts of the Immigration and Nationality Act of 1952.

*1. S. 3455.* The first bill introduced in Congress was S. 3455 of the 81st Congress, 2d session, a bill sponsored by Senator McCarran on April 20, 1950. Section 242(b) of this bill had a specific exemption from the Administrative Procedure Act, as noted in our main brief, p. 16.

The exclusion provision of this bill (section 236) had a detailed code for the conduct of hearings for arriving aliens. The provisions were as follows:

SPECIAL INQUIRY OFFICERS

"SEC. 236 (a). Special inquiry officers shall be designated by the Commissioner or officer in charge at the various ports of arrival when necessary for the prompt determination of all cases of arriving aliens who are detained at such ports under the provisions of section 235 (b). Such special inquiry officers shall be selected from such officials of the Service as the Commissioner shall from time to time designate as qualified to serve in such capacity. One such officer shall have authority in any case to determine whether an arriving alien who has been held for inquiry under section 235 (b) shall be allowed to land or shall be deported, and such determination shall be made by such officer only after he shall have conducted an inquiry under oath in question and answer form. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Commissioner. A complete and permanent record of the proceedings, and of all testimony and evidence produced at such inquiry, shall be kept by the conducting officer.

(b) From a decision of a special inquiry officer adverse to the alien, such alien may take a timely appeal to the Commissioner, and any such alien shall be advised of his right to take such appeal. From a decision of the special inquiry officer to admit an alien, the officer in charge at the port where the inquiry is held may take a timely appeal to the Commissioner. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any

alien whose case is so appealed until the final decision of the Commissioner is made. Except as provided in section 235 (c), such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsection (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Commissioner.

(d) Except as provided in section 213, the decision of a special inquiry officer when based upon the certificate of the examining medical officer, shall be final as to the rejection of an alien affected with tuberculosis in any form or with a loathsome or contagious disease, or with any mental or physical disability which would bring such alien within any of the classes excluded from admission to the United States under section 212."

In its comments on section 236 (on file in the Supreme Court Library) the Immigration Service noted that specific provision had been made in S. 3455 for the exemption of deportation proceedings from the Administrative Procedure Act but no specific exemption had been made in section 236, the exclusion provisions.

The Immigration Service therefore recommended that section 236 (a) be amended by adding the following language:

"Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so established shall be the sole and exclusive procedure for determining the admissibility of a person to the United States."

*2. S. 716* was introduced by Senator McCarran on January 29, 1951 (82d Congress, 1st Session) and H. R. 2379 was introduced by Congressman Walter on February 5, 1951 during the same session of Congress. In sections 236 (a) and 242 (b) these bills specifically refer to the Administrative Procedure Act.

In its comments on S. 716 (on file in the Supreme Court Library) the Immigration Service notes that specific provision is made both in the exclusion and the deportation sections for exemption from the requirements of the Administrative Procedure Act. In its comments on 236(a) the Immigration Service states "The last sentence of subsection (a) specifically provides that the Administrative Procedure Act shall not apply to proceedings for determining the admissibility of a person to the United States."

Commenting on section 242 (b), the Immigration Service states:

> ". . . This subsection specifically provides that the Administrative Procedure Act shall not apply to deportation proceedings."

It will be noted that in S. 716, and the companion bill H. R. 2379, Section 242(b) provided: "Notwithstanding any other law, including the Act of June 11, 1946, the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States."

Section 236(a) provided in both of these bills: "Notwithstanding any other law, including the Act of June 11, 1946, the proceedings so prescribed shall be the sole and exclusive procedure for determining the admissibility of a person to the United States."

*3. Joint Hearings.* Hearings were held on S. 716 and H. R. 2379 during March and April of 1951. These hearings are entitled *Joint Hearings Before The Subcommittees*

*of the Committees on the Judiciary, 82d Congress, 1st Session, on S. 716, H. R. 2379 and H. R. 2816.*

Various organizations objected to the elimination of the Administrative Procedure Act from immigration proceedings.

The position of the American Bar Association is set forth at page 537 as follows:

> "Accordingly we are opposed to so much of sections 242 and 236 of S. 716 insofar as those sections seek to exempt the Immigration Service from the provisions of the Administrative Procedure Act. The act was designed to bring impartial administrative justice to proceedings of Government agencies. We believe that its provisions should be extended rather than curtailed. We believe that compliance with the Administrative Procedure Act by the Immigration Service will improve the efficiency of the Service and respect for the enforcement of our immigration laws."

The American Civil Liberties Union testified as follows, (p. 144):

> "We believe that the provisions of the Administrative Procedure Act which had been applicable to deportation proceedings until eliminated by a rider to an appropriations act of 1950 (Public Law 843, 81st Cong. 2d sess.), should be made applicable again. Every measure to preserve and insure a fair, complete, and unbiased hearing should be provided because of the overwhelming importance which an immigration or naturalization proceeding has in the life of any person."

The representative of the Americans for Democratic Action testified as follows (p. 446):

"The Administrative Procedure Act of 1946 should again be made applicable to deportation proceedings, since the prime consideration is the granting to the aliens involved of a fair, full and unprejudiced hearing."

The representative of the Association of Immigration and Nationality Lawyers testified as follows at p. 690:

"Mr. Lazarus. Mr. Chairman, I think the Administrative Procedure Act which, as you know, is the result of many, many years of investigation and study, should apply to the Immigration and Naturalization Service as it does to the many other Government agencies which do administer our laws.

"Mr. Arens. You mean in both exclusion and in deportation proceedings?

"Mr. Lazarus. I think it should embrace both. It should embrace both, because serious rights are often involved in exclusion cases, the very serious right of citizenship is challenged very often in a board of special inquiry hearing."

The representative of the National Catholic Rural Life Conference advised Congressman Walter by letter as follows, (p. 739):

"There is considerable concern in circles interested in immigration and naturalization over the possible undesirable effects of suspending the Administrative Procedures Act as it affects aliens."

*4. The revised bills.* Thereafter, in the 82d Congress S. 2055 and S. 2550 were introduced by Senator McCarran and H. R. 5678 was introduced by Congressman Walter. These final drafts eliminated the language "notwithstanding any other laws, including the Act of June 11, 1946 (60

Stat. 237)" from the proposed law from sections 236(a) and 242(b). As finally enacted this specific repeal of the Administrative Procedure Act was completely eliminated.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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CARLOS MARCELLO

*v.*

EDWARD J. AHRENS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE (JOHN M. BONDS, OFFICER IN CHARGE, SUBSTITUTED IN PLACE AND STEAD OF EDWARD J. AHRENS)

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

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# In the Supreme Court of the United States

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### OPINIONS BELOW

The opinion of the Court of Appeals (R. 32-44) is reported at 212 F. 2d 830. The opinion of the District Court (R. 19-24) is reported at 113 F. Supp. 22.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1954 (R. 45), and a petition for

rehearing was denied on May 25, 1954 (R. 45-47, 51). The petition for a writ of certiorari was filed on June 17, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the specific provisions of Section 242(b) of the Immigration and Nationality Act of 1952, rather than the general provisions of the Administrative Procedure Act, govern deportation hearings, and if so whether such hearings meet constitutional standards of due process.

2. Whether Section 241(a) and (d) of the Immigration and Nationality Act, requiring deportation for offenses committed prior to the Act which were not grounds for deportation at the time of commission, violate the constitutional proscription against *ex post facto* laws.

3. Whether petitioner has established that his case was prejudged.

## STATUTES INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U. S. C. 1101 *et seq.*) and of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in the Appendix, *infra*, pp. 13-19.

## STATEMENT

After a hearing before a special inquiry officer of the Immigration and Naturalization Service, an order was entered on February 20, 1953, that the alien petitioner be deported under Section 241(a)

(11) of the Immigration and Nationality Act of 1952, (hereinafter referred to as the Act), in that on October 29, 1938, he had been convicted of violating federal laws relating to traffic in narcotic drugs (Pet. XXXIX-LIV). At the hearing petitioner and his counsel had been advised of their right to apply for the Attorney General's discretionary suspension of deportation under Section 244(a)(5) of the Act, but they declined to make such application (Pet. XLVII). On March 4, 1953, the special inquiry officer denied petitioner's motion to reopen the hearing so that he might apply for suspension of deportation, on the ground that petitioner and his counsel had been advised of their right to file such application at the time of the hearing but had refused to do so (Pet. XXXV-XXXVIII).

After a hearing, the Board of Immigration Appeals, on June 1, 1953, affirmed the order of deportation (Pet. XVII-XXXIV). At the instance of petitioner's counsel, the Board itself considered whether suspension of deportation should be granted even though no formal application had been filed. The Board noted that, while consideration of confidential information was permitted, it would under the circumstances "consider only the record, consisting of the hearing and exhibits, in reaching a decision" (Pet. XXXI). In deciding that the discretionary relief of suspension of deportation was not warranted, the Board referred to "the record of [petitioner's] conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation

Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the [petitioner's] own counsel submitted and which refer to the [petitioner] as a racketeer, 'number one mobster in Louisiana'; etc.; and his refusal to testify before the Kefauver Committee" (Pet. XXXIII).

On June 2, 1953, petitioner filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Louisiana. He alleged, *inter alia*, (1) that 8 U. S. C. 1252(b) (Section 242(b) of the Act) was in violation of the due process clause of the Fifth Amendment, in that it did not meet the Amendment's requirements of fairness and impartiality in a hearing, and was violative of the Administrative Procedure Act (5 U. S. C. 1001 to 1011, and particularly Sec. 1004(*c*)); (2) that on the date of petitioner's arrest the Attorney General made a public statement, which was bound to influence the special inquiry officer, to the effect that petitioner was an undesirable citizen for whose deportation the proceedings were designed, and that in 1952 the Attorney General prepared a list of 152 persons, including petitioner, whom he desired to deport; (3) that 8 U. S. C. 1251(a)(11) and (d) (Section 241(a)(11) and (d) of the Act) were unconstitutional as *ex post facto* laws; (4) that the special inquiry officer had arbitrarily re-

fused to reopen petitioner's hearing to consider his application for suspension of deportation (R. 2-13). In his return, respondent alleged that petitioner's deportation had been conducted in accordance with the Constitution, laws, and regulations of the United States, and that petitioner had been properly found deportable under Section 241 of the Act. Respondent also filed the official Immigration Service record of petitioner's deportation proceedings. (R. 14-16.)

After petitioner's counsel introduced in evidence the entire record annexed to the return, he rested his case, and the District Court heard argument for both parties (R. 18). The District Court thereafter filed an opinion holding the deportation order valid (R. 19-24), and entered an order discharging the writ of habeas corpus (R. 25). On appeal (R. 26), the court below unanimously affirmed the judgment (R. 45), and later denied a petition for a rehearing (R. 45-47, 51).

## ARGUMENT

1. Petitioner contends that his deportation hearing, admittedly conducted in conformity with Section 242(b) of the Immigration and Nationality Act, was invalid because it did not comply with the terms of the Administrative Procedure Act (A. P. A.) in that (1) investigative and prosecuting functions of the special inquiry officer are commingled with his adjudicating functions and (2) the officer is amenable to the supervision of the Attorney General and his subordinates charged with

the enforcement of the immigration laws. Petitioner argues, first, that as a matter of statutory construction, the A. P. A. is controlling despite the specific provisions of Section 242(b), and, second, that even if this is not so, the A. P. A. sets the constitutional standards for a due process hearing so that Section 242(b), insofar as it departs from the A. P. A., is unconstitutional. Both arguments are clearly mistaken.

a. As the court below held (R. 37-38), Congress plainly intended the specific provisions of Section 242(b) to govern in deportation proceedings. That section provides that the procedure it prescribes shall be "the sole and exclusive procedure for determining the deportability of an alien under this section." In turn, Section 7(a) of the A. P. A. provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." If it stood alone, Section 242(b) of the Immigration Act, enacted after the A. P. A., would control here. But Section 7(a) of the A. P. A. itself, providing precisely for such a result, leaves no doubt that deportation hearings are governed by the specific provisions of Section 242(b) and not by the general provisions of the A. P. A.*

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* *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A. D.C.), affirmed by an equally divided Court, 346 U. S. 929, invoked by the petitioner (Pet. 33), dealt with the availability of judicial review of deportation orders under A. P. A. Section

This unmistakable result of the plain statutory language is not altered by the general remarks of Senator McCarran and Representative Walter to which petitioner refers (Pet. 32-33). Apart from the broad considerations against petitioner's proposal to amend the specific and unambiguous language of the Act through the generalized comments he cites from the congressional debates, the fact here is that these comments themselves fail to support petitioner's view when they are considered in the light of the background of Section 242. After this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, had held that the Administrative Procedure Act applied to deportation proceedings, Congress, following a suggestion in the opinion that alteration of this result was "a simple matter" (339 U. S. at 47), passed a rider to an appropriation act (64 Stat. 1048) exempting deportation proceedings from Sections 5, 7, and 8 of the A. P. A. The path was thus opened for the Immigration Service to resume its prior practice of having one individual act as both presiding and examining officer, a practice which, although unfavorably commented upon by some courts, had been consistently held not to vitiate hearings otherwise fair. *E. g.*, *Palmer* v. *Ultimo*, 69 F. 2d 1, 2 (C. A. 7), certiorari denied, 293 U. S. 570; *In re Giacobbi*, 32 F. Supp. 508, 515

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10, not with whether Section 5(c), relating to hearing officers, applied in deportation hearings. There is no specific and exclusive provision in the Immigration Act relating to judicial review comparable to the detailed provisions of Section 242 (b), governing hearings.

(N. D. N. Y.). This combining of functions was then forbidden, however, by Section 242(b) of the 1952 Act, which provides:

> No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

Thus, the major evil which this Court in *Sung* had said the A. P. A. was "intended to ameliorate" (339 U. S. at 46) was substantially removed by repeal of the appropriations rider and enactment of Section 242. It is in this sense that the remarks on the floor of Congress that the A. P. A. was being made applicable to deportation must be interpreted in the present context. Such a view amply respects the legislative history and answers the unhappy suggestion that broad observations in debate may be substituted for the specific provisions Congress enacted.

b. Equally without merit is petitioner's contention that even if Congress expressly declared them inapplicable, the provisions of the Administrative Procedure Act must be followed to satisfy constitutional standards of due process. The argument is built upon language in the *Sung* case suggesting that hearings not conforming to that Act might not meet the Constitution's requirements. 339 U. S. at 50. Elsewhere in the opinion, however, the Court observed that if inclusion of immigration hearings

within the coverage of the A. P. A. was erroneous, "relief from Congress is a simple matter" (p. 47), an explicit recognition that suitably fair procedures could be had without adhering to the general prescriptions of that Act. And, as we have noted, Congress acted promptly to exempt deportation proceedings, evidencing a belief that the A. P. A. provided safeguards considerably beyond the constitutional minima. That the belief was well founded is demonstrated by the long history of judicial approval of deportation proceedings prior to the A. P. A.—*e. g.*, in *Tisi* v. *Tod*, 264 U. S. 131, where this Court held that unless there is error "so flagrant as to convince a court that the hearing had was not a fair one," the requirements of due process are met, as they were in the instant case, if the alien is given due notice of the charge and ample opportunity to prepare and present his case, with the aid of counsel if he desires it.

The argument petitioner now makes as to a constitutional necessity for adherence to the A. P. A. was urged in a number of cases started while the appropriations rider was in effect, and was consistently rejected by the courts. *Belizaro* v. *Zimmerman*, 209 F. 2d 282 (C. A. 3); *United States ex rel. Catalano* v. *Shaughnessy*, 197 F. 2d 65, 67 (C. A. 2); *Barber* v. *Yanish*, 196 F. 2d 53, 54, fn. 1 (C. A. 9), certiorari denied, 344 U. S. 817. It has even less substance now under the Immigration and Nationality Act of 1952, which not only bars commingling of functions at a particular hearing but

spells out numerous rights of the alien. Thus, the Act requires that the alien have reasonable notice of the charges against him and of the time and place of hearing; assures the alien the right to examine evidence against him, to present evidence in his own behalf, and to cross-examine government witnesses; and requires that a decision of deportability be predicated upon reasonable, substantial, and probative evidence. The essential elements of due process are clearly embodied in the statute.

2. Petitioner, recognizing that the Court has rejected the argument within the past year, urges only faintly that Section 241(a)(11) and (d) are unconstitutional as violative of the *ex post facto* clause of Article 1, Section 9, Clause 3, of the Constitution (Pet. 35-36). It is well established that deportation laws are civil, not criminal, in nature, and that their retroactive application does not violate the constitutional proscription against *ex post facto* laws. *Galvan* v. *Press*, 347 U. S. 522, 531; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594; *Mahler* v. *Eby*, 264 U. S. 32, 39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591. No ground is suggested to warrant reconsideration of this settled rule.

3. Finally, petitioner contends (Pet. 36-40) that the issuance by the Attorney General in 1952 of a confidential list of undesirable aliens, on which his name was included, and a press release by the Attorney General at the time of petitioner's arrest had the effect of prejudging his deportation case before the special inquiry officer and the Board of

Immigration Appeals. The attempt thus to bring the case within the doctrine of *Accardi* v. *Shaughnessy*, 347 U. S. 260, is unsupported by the record.

As the court below pointed out, with respect to deportability there were no contested factual issues since petitioner's conviction was a matter of record and his deportability under Section 241(a)(11) was therefore established as a matter of law. The special inquiry officer was not required to pass upon any application for suspension of deportation since petitioner failed to submit one when the opportunity was afforded him. As for the Board of Immigration Appeals, it undertook, at the request of petitioner's counsel, to consider whether deportation should be suspended even though the application was not timely. In so doing it expressly noted that it was making no attempt to ascertain whether there was a confidential file with respect to petitioner (Pet. xxxi). It exercised its discretion on the basis of matters submitted by petitioner's counsel, assuming all undeveloped issues of fact in petitioner's favor. Moreover petitioner made no attempt at the habeas corpus hearing to prove his allegations of prejudgment (see R. 18), whereas in *Accardi* no hearing on the habeas corpus petition was permitted by the district judge and Accardi was precluded from offering proof which he contended would show prejudgment of his application for suspension of deportation.

The point in *Accardi*, as we understand it, was that the alien there was denied an opportunity to

prove that his application for discretionary relief had been prejudged; here, there was no such denial and no attempt by petitioner to establish his claim. He is not entitled to a second opportunity.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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*Attorneys.*

JULY, 1954.

APPENDIX

## STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163 *et seq.* provides in pertinent part:

Section 241, 66 Stat. 204 (8 U. S. C. 1251):

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;
>
> * * *
>
> (d) Except as otherwise specifically provided in this section, the provisions of this sec-

tion shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * *

Section 242(b), 66 Stat. 209 (8 U. S. C. 1252):

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the

special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

Section 101(b)(4), 66 Stat. 171 (8 U.S.C. 1101(b)(4)):

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Section 244, 66 Stat. 214 (8 U. S. C. 1254):

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * *
>
> (5) is deportable under paragraph * * * (11) * * * of section 241(a) for an act committed or status acquired subsequent to such entry into the United States * * *; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.
>
> * * *

The Administrative Procedure Act, 60 Stat. 237 *et seq.* provides in pertinent part:

Section 5(c), 60 Stat. 240, 5 U.S.C. 1004(c):

> * * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

Section 7, 60 Stat. 241, 5 U. S. C. 1006:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or desig-

> nated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. * * *

Act of September 27, 1950, 64 Stat. 1044, 1048, provides:

> Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007).

Section 403 of the Immigration and Nationality Act of 1952, 66 Stat. 279, provides:

> (a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
>
> * * *
>
> (47) The paragraph headed "General provisions—Department of Justice" in Chapter III of the Supplemental Appropriation Act, 1951 (Public Law 843, Eighty-first Congress);
>
> * * *

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No. 145

# In the Supreme Court of the United States

OCTOBER TERM, 1954

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CARLOS MARCELLO, PETITIONER

*v.*

EDWARD J. AHRENS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE (JOHN M. BONDS, OFFICER IN CHARGE, SUBSTITUTED IN PLACE AND STEAD OF EDWARD J. AHRENS)

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## MEMORANDUM FOR RESPONDENT IN REPLY TO SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

---

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In his supplemental petition for a writ of certiorari petitioner contends that his status as a nondeportable resident alien was preserved despite enactment of the Immigration and Nationality Act of 1952 (hereinafter called the Act), since the savings clause of the Act shows that it was not the intention of Congress to alter that status (Supp.

Pet. 7). He relies upon the decisions in *United States ex rel. De Luca v. O'Rourke*, 213 F. 2d 759 (C.A. 8), and *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N.D. Cal.). But those decisions, involving a problem clearly different from the one here, are no help to the petitioner.

The aliens in the cited cases had been convicted of narcotics law violations prior to the 1952 Act, but had been saved from deportation by recommendations of the sentencing judges against deportation. See 8 U.S.C., 1940 ed., 155(a). The difficult problem presented by the 1952 Act was this: Section 241(a)(4) of this Act provides for deportation of aliens convicted of crimes involving moral turpitude, in terms neither expressly including nor excluding narcotics violations; section 241(a)(11) provides for deportation of aliens violating the narcotics laws; and section 241(b) provides that a timely recommendation by the sentencing judge against deportation shall render section 241(a)(4) inapplicable. It was thus a close question whether a sentencing judge's recommendation prior to the 1952 Act, though not explicitly declared by the Act to remain effective to prevent deportation under section 241(a)(11), could nevertheless be given such effect on the ground that narcotics law violations were simply a special class of the crimes involving moral turpitude covered by section 241(a)(4). Resolving this neatly balanced issue in the aliens' favor, the courts in both cases found support for this result in the savings clause, section 405(a), of the 1952 Act.

In the instant case, on the other hand, there is no occasion to resort to the savings clause and no basis for petitioner's argument that he enjoys a non-deportable "status" preserved by this clause. Section 241(a)(11) clearly provides that an alien should be deported "who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law * * * governing * * * transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession * * * of * * * marihuana * * *." The Congressional intent to apply the statute to past offenses is made even clearer by Section 241 (d), which makes the provisions of 241 applicable even though the facts on which deportation is based "occurred prior to the date of enactment of this Act." These statutory provisions obviously cover petitioner's conviction in 1938 for two transfers of bulk marihuana.

Petitioner became bound by these statutory provisions which Congress was at liberty to enact, regardless of how long he had enjoyed a non-deportable status under previous law or how much he may have relied upon expected continuation of this status. It is well established that Congress has power to enact statutes for the deportation of aliens because of past misconduct, and such legislation does not involve criminal punishment to make effective the *ex post facto* clause of the Constitution. *Galvan* v. *Press*, 347 U.S. 522, 531; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 595; *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 529; *Mahler* v.

*Ebg*, 264 U.S. 32, 39-40; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280.

For the reasons stated, it is respectfully submitted that the supplemental petition does not disclose any point of substance to warrant granting of the petition for a writ of certiorari.

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# In the Supreme Court of the United States

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CARLOS MARCELLO, PETITIONER

*v.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 145

CARLOS MARCELLO, PETITIONER

*v.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENT

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### OPINIONS BELOW

The opinion of the Court of Appeals (R. 32–44) is reported at 212 F. 2d 830. The opinion of the District Court (R. 19–24) is reported at 113 F. Supp. 22.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1954 (R. 45), and a petition for rehearing was denied on May 25, 1954 (R. 51). The petition for a writ of certiorari was filed on June 17, 1954, and granted on October 14, 1954 (R. 86). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant Constitutional provisions, statutes, and regulations are set forth in Appendix A of the petitioner's brief (Pet. Br. 57–64), except that we have set forth in Appendix A of this brief (*infra*, pp. 45–50) certain regulations of the Immigration and Naturalization Service, i. e., 8 C. F. R. 242.53.

## QUESTIONS PRESENTED

1. Whether petitioner has shown that his case was prejudged within the meaning of *Accardi* v. *Shaughnessy*, 347 U. S. 260.

2. Whether deportation proceedings must be conducted in accordance with the Administrative Procedure Act.

3. Whether Section 241 (a) (11) and (d) of the Immigration and Nationality Act, in requiring deportation because of conviction of criminal offenses which were not grounds for deportation when they were committed, is invalid as an *ex post facto* law.

## STATEMENT

After a hearing before a special inquiry officer of the Immigration and Naturalization Service, an order was entered on February 20, 1953, that the alien petitioner be deported under Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (hereinafter referred to as the Act), in that on October 29, 1938, he had been convicted of violating federal laws relating to traffic in nar-

cotic drugs (R. 67–79). At the hearing, petitioner and his counsel were advised of his right to apply to the Attorney General for the discretionary relief of suspension of deportation under Section 244 (a) (5) of the Act, but they declined to make such application (R. 74, 80–81). On March 4, 1953, the special inquiry officer denied petitioner's motion to reopen the hearing so that he might apply for suspension of deportation, on the ground that petitioner and his counsel had been advised of their right to file such application at the time of the hearing but had refused to do so (R. 79–81).

Upon appeal, the Board of Immigration Appeals, on June 1, 1953, affirmed the order of deportation (R. 54–67). At the instance of petitioner's counsel, the Board itself considered whether suspension of deportation should be granted even though no formal application had been filed. The Board noted that, while consideration of confidential information was permitted, it would under the circumstances "consider only the record, consisting of the hearing and exhibits, in reaching a decision" (R. 64). In deciding that the discretionary relief of suspension of deportation was not warranted, the Board referred to "the record of [petitioner's] conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions; that most of the charges were dismissed but that in 1930 he was

sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the [petitioner's] own counsel submitted and which refer to the [petitioner] as a racketeer, 'number one mobster in Louisiana'; etc.; and his refusal to testify before the Kefauver Committee." (R. 66.)

On June 2, 1953, petitioner filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Louisiana. He alleged, *inter alia*, (1) that 8 U. S. C. 1252 (b) (Section 242 (b) of the Act) violated the due process clause of the Fifth Amendment, in that it did not meet the Amendment's requirements of fairness and impartiality in a hearing, and, also, violated the Administrative Procedure Act (5 U. S. C. 1001 to 1011, particularly Section 1004 (c)); (2) that on the date of petitioner's arrest the Attorney General made a public statement, which was bound to influence the special inquiry officer, to the effect that petitioner was an undesirable citizen for whose deportation the proceedings were designed, and that in 1952 the Attorney General prepared a list of 152 persons, including petitioner, whom he desired to deport; (3) that 8 U. S. C. 1251 (a) (11) and (d) (Sections 241 (a) (11) and (d) of the Act) were unconstitutional as *ex post facto* laws; and (4) that the special inquiry officer had arbitrarily refused to reopen petitioner's hearing to consider

his application for suspension of deportation (R. 2–13). In his return, respondent's predecessor alleged that petitioner's deportation had been conducted in accordance with the Constitution, laws, and regulations of the United States, and that petitioner had been properly found deportable under Section 241 of the Act. There was also filed the official Immigration Service record of petitioner's deportation proceedings (R. 14–16).

After petitioner's counsel introduced in evidence the entire record annexed to the return, he rested his case, and the District Court heard argument for both parties (R. 18). The District Court thereafter filed an opinion holding the deportation order valid (R. 19–24), and entered an order discharging the writ of habeas corpus (R. 25). On appeal (R. 26), the court below unanimously affirmed the judgment (R. 45), and later denied a petition for a rehearing (R. 45–47, 51).

## SUMMARY OF ARGUMENT

### I

A. Petitioner contends that the fact that he was included in the Attorney General's deportation program and that this was known to the special inquiry officer and to the Board of Immigration Appeals constituted such prejudgment of his case within the rule of *Accardi* v. *Shaughnessy*, 347 U. S. 260, as to invalidate the order for his deportation. The *Accardi* case is again before this Court as *Shaughnessy* v. *Accardi*, No.

616, and we there contend that under the earlier *Accardi* decision an alien must show, not only that he was included in the program and that the Board knew it, but also that the Board was thereby precluded from exercising an independent judgment on his case. If the Court concurs in our view, it follows that petitioner is not entitled to a new hearing before the Board, since he did not even offer to prove that the Board had so prejudged his case.

B. Even if this Court should hold that an alien ordinarily need only show that the Board was aware that he was included in the Attorney General's deportation program, in order to be entitled to a new hearing before the Board, petitioner is not entitled to a new hearing because the record affirmatively shows that the Board exercised an independent judgment in deciding his case.

## II

A. The Administrative Procedure Act does not apply to deportation proceedings. Section 242 (b) of the Immigration and Nationality Act prescribes detailed procedures for determining the deportability of aliens, and requires that such proceedings be conducted before special inquiry officers. It further provides that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." Petitioner contends that even if special inquiry officers may conduct deportation hearings (as special statutory hearing

officers within the meaning of the exception in Section 7 (a) of the Administrative Procedure Act), they are subject to Section 5 (c) of that Act which provides that hearing officers may not be under the supervision of agency officers who perform enforcement functions. However, Section 101 (b) (4) of the Immigration and Nationality Act provides that special inquiry officers "shall be subject to such supervision * * * as the Attorney General shall prescribe," thus making inapplicable the separation of functions requirements of Section 5 (c).

Moreover, the language and legislative history of Section 242 (b) clearly indicate that Congress intended its procedural requirements to govern deportation hearings to the exclusion of the Administrative Procedure Act. Stated otherwise, Congress inserted in Section 242 (b) those principles of the Administrative Procedure Act which it desired to apply to deportation. The inapplicability of the Administrative Procedure Act to deportation proceedings under the 1952 Act is further evidenced by the contemporary understanding of the Department of Justice, critics of the 1952 Act, and the practicing bar.

B. Petitioner's further contention that due process of law requires that deportation proceedings be conducted in accordance with "currently prevailing standards of impartiality" as embodied in the separation of functions requirements of Section 5 (c) is without substance. It is conceded that, prior to the enactment of the

Administrative Procedure Act in 1946, deportation hearings were not invalid because they were conducted by immigation employees who were under the supervision of officers with enforcement functions. Moreover, the requirements of Section 5 (c) are by no means a universal standard, since Congress has exempted from them formal proceedings involving rule-making and applications for licenses, and has provided more or less strict requirements in later amendments to the National Labor Relations Act and the Communications Act, and in the Immigration and Nationality Act. In any event, there is no doubt as to "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 276. The fact that in many deportation cases the deportability of the alien is undisputed, leaving only the question of whether some form of discretionary relief should be granted, is ample justification for Congress to prescribe deportation procedures varying from those of the Administrative Procedure Act.

## III

Section 241 (a) (11) and (d) of the Immigration and Nationality Act, in providing for deportation because of past convictions for criminal offenses which were not grounds for deportation when they were committed, does not violate the

*ex post facto* clause of the Constitution. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–595; *Galvan* v. *Press*, 347 U. S. 522, 530–531.

## ARGUMENT

### I. PETITIONER HAS NOT ESTABLISHED THAT HIS CASE WAS PREJUDGED WITHIN THE MEANING OF *ACCARDI* V. *SHAUGHNESSY*, 347 U. S. 260

#### A. PETITIONER IS NOT ENTITLED TO A NEW HEARING BECAUSE HE MADE NO OFFER TO PROVE THAT THE BOARD OF IMMIGRATION APPEALS WAS IMPROPERLY INFLUENCED BY THE FACT THAT HE WAS INCLUDED IN THE ATTORNEY GENERAL'S DEPORTATION PROGRAM

In his petition for a writ of habeas corpus (R. 7–8), petitioner alleged that his case had been prejudged in that (1) on the day of his arrest the then Attorney General had issued a public statement concerning petitioner which "was bound to have great effect upon the special inquiry officer"; (2) on information and belief, that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that petitioner's name was on that list.

Petitioner made no attempt at the hearing on the habeas corpus petition to substantiate these allegations (R. 17). The deportation record which was introduced in evidence does show that, at the deportation hearing before the special inquiry officer, he offered as evidence six newspaper clippings (R. 42, 67), some of which referred to the Attorney General's statement.[1] And in oral

[1] The statement itself was never offered in evidence. We have reproduced it as Appendix C to this brief (*infra*, pp. 53–54). An earlier general statement of the Attorney General is set forth in Appendix B (*infra*, pp. 51–52).

argument before the Board of Immigration Appeals, petitioner's attorney stated (R. 85): "I also have the feeling—and it's a feeling that's based on evidence which we will supply—that the real basis for the denial of suspension here was the fact that Marcello was one of these hundred whom the Attorney General had named. * * *" At no point in the administrative process, however, did he present or offer to present any evidence in support of his charge. The deportation record also shows that the special inquiry officer in his formal opinion in this case, said (R. 72):

> While the instant case does not involve a subversive issue, the inference has been made that the Special Inquiry Officer being responsible to the Attorney General would not be capable of passing a fair and honest judgment in the case. There is no basis for counsel's contention and no restrictions are placed upon the Special Inquiry Officer in his conduct of hearings other than that they be conducted in accordance with the law and the regulations promulgated thereunder. Certainly the Attorney General expects these hearings to be conducted in accordance with the highest standards of fairness and impartiality and that the decision rendered by the Special Inquiry Officer be rendered strictly in accordance with the evidence presented at the hearing.

The Chairman of the Board of Immigration Appeals, in response to counsel's assertion at the oral argument that the Attorney General's public pronouncements must inevitably prejudice his

subordinates against petitioner, pointed out (R. 8 ) that the person who had made such announcement was no longer the Attorney General. And the Service representative emphasized in his oral argument before the Board (R. 85–86) that it was inconceivable that any Attorney General would contemplate "that a person should be deported if the law provided otherwise."

Thus, it appears that petitioner was included in the Attorney General's deportation program and that the special inquiry officer and the Board of Immigration Appeals were aware of that fact, if only because petitioner told them. To this extent, the case resembles *Shaughnessy* v. *Accardi,* No. 616, now pending before this Court. If the Court should hold, with the majority of the Second Circuit in *Accardi* upon remand, that under this Court's decision in *Accardi* v. *Shaughnessy,* 347 U. S. 260, an alien is entitled to a new hearing before the Board of Immigration Appeals if he shows only that he was included in the program and that the Board knew it, then this petitioner also is entitled to such a new hearing, subject to the matters of record discussed below. On the other hand, if the Court agrees with our contention in *Shaughnessy* v. *Accardi, supra,* that the alien must also allege and prove that the Board was influenced by its knowledge that he was included in the program, then this petitioner is not entitled to a new hearing before the Board. For in the District Court in this case, petitioner, unlike *Accardi,* made no offer of proof that either

the Board or the special inquiry officer had been improperly influenced. Indeed, petitioner did not even allege that the *Board* had been so influenced. Even if his allegation that the Attorney General's statement "was bound to have great effect upon the special inquiry officer" sufficiently alleges prejudgment, it is immaterial since the special inquiry officer did not consider the issue of discretionary relief—the only issue in the case upon which the alleged bias or prejudgment could have any effect.

B. THE RECORD AFFIRMATIVELY SHOWS THAT THE BOARD OF IMMIGRATION APPEALS EXERCISED AN INDEPENDENT JUDGMENT IN THIS CASE

The record clearly shows that the Board of Immigration Appeals exercised an independent judgment. As to petitioner's deportability, the issue was wholly a legal one on undisputed facts. Petitioner's conviction under the Marihuana Tax Act was a matter of record. The Attorney General's press release (Appendix C, *infra*, p. 53) was merely a statement of what was evident from the statute itself, that the 1952 Act made that conviction a ground for deportation. Nothing the Attorney General said or did not say could change the facts of this case with respect to the conviction and the provisions of the statute. The issues of constitutionality which petitioner now raises are obviously matters for a court, and not for the administrative agencies which must take the law as Congress has enacted it.

As to the application for the discretionary relief of suspension of deportation, the allegation of prejudgment is negatived by the fact that, although petitioner had been advised of his right to apply for such relief and had refused to make such application during the hearing before the special inquiry officer, the Board of Immigration Appeals, at the instance of petitioner's counsel, proceeded to consider the application on its merits (R. 64). And, although the Board was aware of its right to consider confidential information, it did not do so but considered the case on the record before it.

The action of the Board in denying suspension of deportation in no way indicates bias. The record (R. 66, 82–84) fully justifies the refusal to grant such extraordinary relief, which is in the nature of a pardon. The factors to be considered in determining whether to grant suspension are obviously very different from those to be considered in determining deportability or guilt of a crime. What the Board was called upon to decide on the suspension issue was whether, on the totality of the evidence before it, petitioner was the type of alien who, despite his statutory liability for deportation, was a sufficiently desirable person to be granted the privilege of continuing to reside in the United States. No one factor may in itself be conclusive in reaching such a determination. Thus, petitioner's marihuana conviction, which occurred more than ten years before the application for suspension, would not necessarily preclude the granting of

relief if the Board were convinced that petitioner had thereafter reformed and become a desirable citizen, but it was a factor which the Board could properly take into account. See *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 373 (C. A. 2). Similarly, the Board was entitled to take into account petitioner's earlier conviction and sentence to nine to fourteen years' imprisonment for assault and robbery for which he was pardoned subsequently. And in determining whether petitioner had in fact reformed and is presently a desirable person, the Board could properly consider the fact that he had asserted the privilege against self-incrimination before the Kefauver committee when questioned as to his gambling activities. *Marcello* v. *United States*, 196 F. 2d 437 (C. A. 5). It is one thing to say that the claim of privilege is not affirmative proof of any kind with relation to guilt, and it is another to say that a claim of the privilege in relation to possible involvement in crime has no possible relevancy in determining whether a person is entitled to a special privilege in the nature of a pardon. Cf. *Orloff* v. *Willoughby*, 345 U. S. 83, 91, where this Court recognized a claim of privilege as to membership in organizations as a valid ground for refusal to grant a commission in the armed forces. It was petitioner's obligation to show that he was a desirable alien. Nothing in the record he presented shows any reason why he should have been given such relief.

It is clear that there has been an exercise of

discretion in this case, both in considering petitioner's application after he had initially refused to apply for such relief, and in determining that petitioner had not made out a case for such relief. There is thus no necessity to send the case back for further hearing.

### II. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT APPLY TO DEPORTATION PROCEEDINGS

The petitioner contends that the order for his deportation is void because it was issued after administrative proceedings which admittedly were not conducted in accordance with the Administrative Procedure Act. Specifically, he contends that the deportation hearing was defective in that it was conducted by a special inquiry officer who was under the supervision of officers of the Immigration and Naturalization Service who engage in investigating and prosecuting functions, in violation of Section 5 (c) of the Administrative Procedure Act.[2]

We contend that Section 242 (b) of the Immigration and Nationality Act prescribes a special procedure for deportation cases, to the exclusion of the requirements of the APA. The purpose of Congress not to apply the APA to deportation proceedings is apparent from the language of Section 242 (b), its history and context, and its

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[2] Section 5 (c) provides in pertinent part that "nor shall such [hearing] officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

contemporaneous construction by both the Immigration Service, the practicing bar, and others. The petitioner does not deny that the deportation proceedings in this case complied with the requirements of Section 242 (b).

A. BACKGROUND FOR INTERPRETING THE PROCEDURES OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

1. *Deportation procedure prior to the 1952 Act.* Prior to the enactment of the Immigration and Nationality Act of 1952, the immigration statutes did not specify procedures for determining the deportability of aliens. Thus, Section 19 (a) of the Immigration Act of 1917 (8 U. S. C. [1946 ed.] 155 (a)) simply provided that aliens in the deportable classes "shall, upon warrant of the Attorney General, be taken into custody and deported." However, it was long ago established by the decisions of this Court that due process of law requires that deportation be preceded by an opportunity for a hearing providing the basic elements of fairness. *The Japanese Immigrant Case*, 189 U. S. 86; *Vajtauer* v. *Commissioner*, 273 U. S. 103. Subject to such due process requirements, the detailed procedures in deportation cases were prescribed only in regulations issued by the Attorney General.

When the Administrative Procedure Act became law on June 11, 1946, the Department of Justice was of the view that the Act did not apply to the conduct of deportation proceedings. However, in February 1950, this Court held, in *Wong*

*Yang Sung* v. *McGrath*, 339 U. S. 23, that deportation proceedings were subject to the Act. In September 1950, Congress provided in the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) that "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act."

In brief, except for the few months between the *Sung* decision and the enactment of the Supplemental Appropriation Act, 1951, Congress has not permitted the application of the APA to deportation proceedings, unless it has done so in the Immigration and Nationality Act of 1952.

2. *Special inquiry officers under the 1952 Act.* Sections 236 and 242 (b) of the 1952 Act require that hearings in exclusion and deportation cases be conducted by "special inquiry officers". Section 101 (b) (4) provides that "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings."

In the great majority of deportation cases, the facts relating to the issue of deportability are largely undisputed, *e. g.* criminal convictions as evidenced by court records, and the real issue is

whether the alien is entitled to some form of discretionary relief such as suspension of deportation. During the Senate debates on the 1952 Act, Senator McCarran noted that "in the majority of deportation cases the issue is simply whether or not the alien entered with proper documents or whether the alien overstayed his period of temporary admission, and that the facts are generally uncontested". 98 Cong. Rec. 5626. It was this characteristic of most deportation cases which led Congress, in Section 242 (b), to provide that the special inquiry officer normally will both preside at the hearing and present the evidence in support of the deportation charges. However, that section expressly authorizes the Attorney General to provide a separate prosecutor in particular cases, as was done in the instant case. The duties of special inquiry officers are further defined in the regulations set out in Appendix A, *infra*, pp. 45–50.

At the present time, there are 75 special inquiry officers assigned to the various districts of the Immigration and Naturalization Service. While most of them are not lawyers, all are experienced in immigration matters. In deportation and exclusion cases, their decisions are final unless appealed to the Board of Immigration Appeals. They are expected to act independently and impartially. Special inquiry officers are subject to the supervision of the District Directors of the districts to which they are assigned and of higher officials of the Service, in such matters as assign-

ments and efficiency ratings. Since District Directors and such officials have enforcement responsibilities, this supervisory relationship would violate Section 5 (c) of the APA if it were applicable.

B. SECTION 242 (B) OF THE IMMIGRATION AND NATIONALITY ACT PROVIDES A SPECIAL PROCEDURE FOR DEPORTATION CASES TO THE EXCLUSION OF THE ADMINISTRATIVE PROCEDURE ACT

1. *The statute.* Section 242 (b) of the Immigration and Nationality Act of 1952 provides that "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, * * *," and that "Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, * * *" (Pet. Br. 58). After prescribing in detail the powers and functions of special inquiry officers and the rights of aliens in deportation proceedings, Section 242 (b) provides that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section" (Pet. Br. 60). As noted above, Section 101 (b) (4) (Pet. Br. 60) also provides expressly that

> The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or

> by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

It is clear that the reiterated command of Section 242 (b), that deportation hearings shall be conducted only by special inquiry officers, brings such officers within the exception of Section 7 (a) of the APA for "officers specially provided for by or designated pursuant to statute". Without more, therefore, it is plain that deportation hearings need not be conducted by hearing examiners appointed under Section 11 of the APA, and petitioner so concedes or assumes (Pet. Br. 25).

However, petitioner insists that special inquiry officers, even if within the quoted exception in Section 7 (a), remain subject to the prohibitions of Section 5 (c)—particularly the provision that hearing officers shall not be under the supervision of officers who perform investigating or prosecuting functions (Pet. Br. 24–26). If the Immigration and Nationality Act did no more than require that deportation hearings be conducted by special inquiry officers, the petitioner's contention might possibly be correct because the exception in Section 7 (a) of the APA for special classes of hearing officers is not an exemption from all of the APA. However, Section 101 (b) (4) of the Immigration and Nationality Act, quoted above, specifically provides that "Such special inquiry

officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe." This specific direction that the Attorney General shall prescribe the supervision to which special inquiry officers shall be subjected is utterly inconsistent with the notion that their relationship to the Attorney General and to the Immigration Service is defined by Section 5 (c) of the APA. The report of the President's Commission on Immigration and Naturalization, *Whom We Shall Welcome* (1953) p. 162, expressly recognizes that the Attorney General under Section 101 (b) (4), rather than Section 5 (c) of the APA, controls the status of special inquiry officers. Thus, Section 101 (b) (4) controls, to the exclusion of the APA, the only specific respect in which petitioner urges that his hearings violated the APA.

Moreover, we contend that Section 242 (b) embodies a clear Congressional purpose to except deportation proceedings from all of the provisions of the Administrative Procedure Act. To begin with, if Congress had desired to subject deportation cases to the APA, it need only have required an opportunity for a hearing in order to invoke automatically the provisions of Sections 5, 7 and 8 of the APA, which apply in cases of adjudication in which a statute requires a hearing. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. Or, if Congress had simply required an opportunity for a hearing before a special inquiry officer, deportation proceedings would be excepted, under the exception

clause in Section 7 (a), from the necessity for employing hearing examiners appointed under Section 11, but would be subject to the other provisions of the APA.

Instead, in Section 242 (b), Congress enumerated in unusual detail the rights which it desired to accord to aliens in deportation proceedings. In doing so, it specified many of the procedural rights set forth in the APA, rather than leaving such aliens to rely upon the APA as do the parties to other formal regulatory proceedings which are subject to the APA. We set forth below pertinent portions of Section 242 (b), indicating in brackets following the particular requirements the roughly equivalent provisions of the APA:

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. [APA, Section 7 (b).] Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.

If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. [APA, Section 11.] Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held; [APA, Section 5 (a)]

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose; [APA, Section 6 (a)]

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and [APA, Section 7 (c)]

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. [APA, Section 7 (c).]

Thus, Section 242 (b) consists of a detailed procedural code which would be largely superfluous if, as petitioner contends, Congress had intended the APA to apply to deportation proceedings. Immediately following these provisions, Section 242 (b) goes on to provide that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The natural meaning of these words, reinforced by their context, is that the Congress has clearly and explicitly excepted deportation proceedings from

all of the APA,[3] except to the extent that it has written in Section 242 (b) many of the principles of the APA.

This conclusion has been reached, not only by the court below, but also by every other court which has considered the question. *Farquharson* v. *Landon*, 217 F. 2d 603 (C. A. 9); *Couto* v. *Shaughnessy*, 218 F. 2d 758 (C. A. 2), pending on petition for a writ of certiorari, No. 653; *Suarez-Seja* v. *Landon*, 124 F. Supp. 871 (S. D. Cal.).

2. *The legislative history.* The committee reports and debates incident to the enactment of the 1952 Act amply confirm the express language of Section 242 (b), and reiterate the purpose of Congress to set forth in Section 242 (b) those principles of the APA which it chose to apply to deportation proceedings.

Section 242 (b) had its genesis in a shorter and more general form as Section 242 (b) of S. 3455, 81st Congress, 2d Session, introduced by Senator McCarran in 1950. It appears in somewhat refined form in S. 716 and H. R. 2379, both 82d Cong., 1st Session, introduced by Senator McCarran and Representative Walter in 1951. In these

[3] In view of the express language of Sections 101 (b) (4) and 242 (b), there is not involved any serious question as to the interpretation of the provision of Section 12 of the APA that "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

1950 and 1951 bills, Section 242 (b) provided that "Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237) [the APA], the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of any alien who is in the United States." All later bills on the subject omitted the phrase "Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237)."

Early in 1952, the Senate and House Committees on the Judiciary respectively reported S. 2550 and H. R. 5678, 82d Congress. In both these bills, Section 242 (b) appeared in substantially its present form and in both it provided, as it now does, that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

In the accompanying report of the Senate Judiciary Committee (Sen. Rep. 1137, 82d Cong., 2d Sess., p. 28), presented by Senator McCarran, the following explanation is given:

> *The problem intended to be met by the language of the two predecessor bills in relation to the administrative process is solved by the language of sections 101 (b) (4), 236 and 242 (b) of the instant bill.* Under the provisions of those sections, special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, under which

> proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. *These procedures are made the sole and exclusive ones in such matters. The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act* contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.) *is specifically repealed, since the special procedures in the bill make such exemption no longer necessary.* [Emphasis added].

A similar statement appears in the report of the House Committee on the Judiciary.[4]

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[4] The statement is as follows (H. Rep. 1365, 82d Cong., 2d Sess., 55–56, 58):

The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.), is specifically repealed by section 403 (a) (46) of the instant bill. Under sections 101 (b) (4), 236, and 242 (b) special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. These procedures are made the sole and exclusive ones in such matters.

* * * * *

The bill declares that the prescribed deportation proceedings shall be the sole and exclusive procedure for determining the deportability of any alien, notwithstanding the provisions of any other law.

It should be noted that the minority of the Senate Judiciary Committee had no doubt as to the intended purpose of Sections 101 (b) (4) and 242 (b), for they charged, in their separate report (Part 2 of Sen. Rep. 1137, p. 7), that—

> S. 2550 invalidates or emasculates the application of the Administrative Procedure Act to immigration and deportation cases at many points. In effect it would make permanent law of an appropriation rider overruling the decision of the United States Supreme Court in *Wong Yang Sung* v. *McGrath* (339 U. S. 33), and would endorse the practice of prosecutors serving as judges in immigration cases.

During the debate in the Senate, Senator Douglas attacked the bill for its failure to make the APA wholly applicable to deportation and exclusion proceedings, and urged the adoption of a substitute amendment (S. 2842, 82d Cong., 2d Sess.) which would have done so specifically. Thereupon, Senator McCarran, in reply, made the most detailed explanation of the procedural provisions of the bill which occurred in the entire Congressional debate, as follows (98 Cong. Rec. 5625–5626):

> The committee bill, likewise, repeals the present exemption of exclusion and expulsion proceedings from certain of the pro-

visions of the Administrative Procedure Act, but the committee bill goes further by writing within the framework of the Administrative Procedure Act *specific procedures which are specially adapted to the exclusion and expulsion of aliens.*

* * * * *

Under the provisions of section 242 of Senate bill 2550, this exemption [referring to the appropriation rider] is terminated. *The procedural requirements to be followed in the conduct of deportation cases are set out in detail.* Except for the failure to comply strictly with the dual-examiner provisions of the Administrative Procedure Act, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act. I further believe that it has been demonstrated that it would be impracticable to adapt the dual-examiner system to the deportation procedures and that the special procedures provided in this bill are not inconsistent with section 7 of the Administrative Procedure Act which specifically exempts from the dual-examiner requirements specified classes of proceedings before officers specially provided for by, or designated pursuant to, statute.

Let me stress this point, Mr. President: *My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act. This bill eliminates such an exemption in the case of deportation proceedings, but accomplishes such elimination*

> *with due regard for the administrative problems of the Immigration and Naturalization Service by providing at the same time the special procedures which these problems require. An important point here is that the Congress is providing these procedures. Under a blanket exemption, the agency would prescribe its own procedures.* [Emphasis added.]

The Conference Report (H. Rep. 2096, 82d Cong., 2d Sess., p. 127) significantly remarks that "the procedures provided in the bill * * * remain within the framework and the pattern of the Administrative Procedure Act."

Thus, the development of Section 242 (b) was from general procedural requirements, coupled with a complete exemption from the APA, which would have left the Attorney General with large discretion to prescribe deportation procedures, to a detailed and exclusive procedural code, partly drawn from the APA and shaped to the peculiar problems of deportation. The clear purpose of the draftsmen was to exclude the application of the APA as such.

Petitioner has culled from the unusually bitter debates over the bill various general statements of Representative Walter and Senator McCarran to the effect that the entire APA was applicable to deportation proceedings (Pet. Br. pp. 19–20). When these statements are evaluated in the light of the committee reports submitted by Representative Walter and Senator McCarran (*supra*, pp. 26–28), and particularly when Senator McCarran's

statements are read with his detailed reply to Senator Douglas (*supra*, pp. 28–30), it is clear that they meant that special procedures had been tailored for the conduct of deportation (and exclusion) procedures, and that these special procedures specifically embodied such of the principles of the APA as they thought could be applied usefully. Indeed, as petitioner recognizes, Senator McCarran's express statement that the "dual examiner provisions" of the APA were inapplicable (*supra*, p. 29), by which he meant that under Section 242 (b) a special inquiry officer could act as both prosecutor and hearing officer (Pet. Br. 22), undermines any suggestion that deportation proceedings are subject to the provisions of the APA except as they are embodied in Section 242 (b).

3. *The contemporary construction of the 1952 Act.* It is a significant guide to the interpretation of Sections 101 (b) (4) and 242 (b) that the Department of Justice, which was charged with the administration of the Act and which was in close contact with its legislative evolution, has from the beginning interpreted those sections as controlling deportation proceedings to the complete exclusion of the APA.[5] It should be noted

[5] While petitioner suggests (Pet. Br. pp. 28–29) that the Immigration Service, by providing in some cases for the participation of an examining officer or prosecutor in addition to the special inquiry officer, has itself recognized that Section 242 (b) does not provide an exclusive procedure, the suggestion is erroneous in that it overlooks the fact that Section 242 (b) expressly authorizes such use of a separate prosecutor.

that the Congress, whose concern with administration of the immigration laws culminated with the creation in Section 401 (of the 1952 Act) of a Joint Committee on Immigration and Nationality Policy, has given no indication that it disagrees with this administrative construction.

Equally significant is the fact that the severest critics of the 1952 Act have recognized that Section 101 (b) (4) and Section 242 (b) make the APA inapplicable. Thus, in *Whom We Shall Welcome* (1953) pp. 159–160, the report of the President's Commission on Immigration and Naturalization, prepared after enactment of the 1952 Act, it is stated that these sections "forge a pattern which reveals an unmistakable purpose to exempt immigration hearings from the procedural requirements of the Administrative Procedure Act," and that "The apparent purpose of these provisions was to establish an exemption from the procedural requirements of the Administrative Procedure Act without specifically mentioning that statute." Moreover, the Commission specifically recognized that Section 101 (b) (4), providing that special inquiry officers "shall be subject to such supervision * * * as the Attorney General shall prescribe", authorized placing them under the supervision of officers with enforcement functions. *Ibid.* p. 162.

Indeed, petitioner's present counsel, Mr. Wasserman, testified before the Commission shortly after enactment of the 1952 Act, as the representative of the Association of Immigration and Na-

tionality Lawyers. On that occasion, he made the following statement:

> Section 242–b of Public Law 414 does not provide for the type of independent hearing examiners which fairness and the due-process clause of the Constitution, and *Sung* v. *McGrath* (339 U. S. 33), require in deportation cases. Provision is merely made for a special inquiry officer who may be an investigator or prosecutor for the Im[mi]gration Service one day and a hearing officer the next, provided that he has not investigated the case he is hearing. In the very case that he hears, the special inquiry officer will be required to develop the case against the alien and then sit in judgment. *In addition, contrary to the Administrative Procedure Act (5 U. S. C. 1004, 1010) the special inquiry officer will be subject to control of district directors and Assistant Commissioners of the Immigration Service who engage in investigative and prosecuting functions.* * * * [Emphasis added.] [*Hearings before the President's Commission on Immigration and Naturalization* (1952), pp. 1597–1598.]

Thus, responsible criticism of the 1952 Act, contemporaneous with its enactment, recognized that Sections 101 (b) (4) and 242 (b) made the APA entirely inapplicable to deportation proceedings.

4. *Practical consequences.* If it should be held that the APA is more or less applicable to deportation proceedings conducted under Section 242 (b), the result will be to invalidate all outstanding deportation orders issued under the 1952

Act after proceedings in which appropriate and timely objection was made. Cf. *United States* v. *Tucker Truck Lines*, 344 U. S. 33.

Equally important, the rationale of the petitioner's argument may be as applicable to exclusion proceedings under Section 236, which provides that its detailed procedures required to be conducted by a special inquiry officer, "shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section." The fact that there is not the slightest suggestion that Congress in 1952 intended to subject exclusion procedures to the APA compels the rejection of any construction of the 1952 Act which would make the APA applicable to both deportation and exclusion proceedings.

5. *Summary.* The language, legislative history, and contemporary construction and understanding of Sections 101 (b) (4) and 242 (b) indicate a clear and specific purpose of Congress to except deportation (and exclusion) proceedings from all of the APA as such. In these sections, Congress has shaped special and exclusive procedures for determining deportability and which embody those principles of the APA which Congress desired to apply in such cases.

C. DUE PROCESS OF LAW DOES NOT REQUIRE THE APPLICATION TO DEPORTATION PROCEEDINGS OF THE SEPARATION OF FUNCTIONS REQUIREMENTS OF SECTION 5 (C) OF THE ADMINISTRATIVE PROCEDURE ACT

Petitioner also contends (Pet. Br. 29–40) that, even if the APA does not apply to deportation

proceedings, due process of law requires that such proceedings be conducted in accordance with the separation of functions requirements of Section 5 (c) of the APA. Specifically, he contends that there is a denial of due process in that, as specifically authorized by Section 242 (b), the special inquiry officer usually both conducts the hearing and introduces evidence in support of the deportation charge, and may have performed other prosecuting or investigatory functions in other deportation cases. We concede that such combinations of functions are prohibited by Section 5 (c). Petitioner alleges a further violation of due process in that the special inquiry officer in this and similar cases is under the supervision of officials of the Immigration Service with enforcement functions to an extent which would violate Section 5 (c) of the APA.[8] Relying primarily upon language from this Courts' opinion in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50–51, petitioner asserts that due process of law requires that deportation proceedings be conducted in accordance with "currently prevailing standards of impartiality" which, he contends, consist particularly of the separation of functions requirements of Section 5 (c).

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[8] In petitioner's deportation hearing, a separate prosecutor appeared and the special inquiry officer acted only in a presiding and deciding role. Thus, petitioner has standing to complain only that the special inquiry officer may have performed investigatory or prosecuting functions in other cases, and is under the supervision of officials with enforcement functions.

Petitioner does not deny that, prior to the APA and the *Sung* decision, it was settled that the combination of functions of prosecution and decision in a single hearing officer, who was under the supervision of enforcement officials, did not offend due process. *In re Giacobbi*, 32 F. Supp. 508 (N. D. N. Y.), affirmed *sub nom. United States ex rel. Giacobbi* v. *Fluckey*, 111 F. 2d 297 (C. A. 2); *United States ex rel. Boric* v. *Marshall*, 4 F. Supp. 965 (W. D. Pa.), appeal dismissed, 67 F. 2d 1020 (C. A. 3), certiorari dismissed, 290 U. S. 709; *Palmer* v. *Ultimo*, 69 F. 2d 1 (C. A. 7), certiorari denied, 293 U. S. 570; *Reynolds* v. *United States ex rel. Dean*, 68 F. 2d 346 (C. A. 7), certiorari denied, 291 U. S. 679; *United States ex rel. Catalano* v. *Shaughnessy*, 197 F. 2d 65 (C. A. 2).

In *Sung* v. *McGrath, supra*, this Court held as a matter of statutory construction that the APA governed deportation proceedings. In so holding, the Court's opinion contains a passage (339 U. S. at 50–51) relied upon by petitioner (Pet. Br. 30–31), particularly the statement that "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." From this passage, including the quoted statement, petitioner deduces that only a hearing conducted in accordance with Section 5 (c) of the APA can satisfy the requirements of due process.

We respectfully submit that this passage of the Court's opinion does not bear the reading petitioner puts upon it, and, at most, is dictum, as

shown by the fact that in the same opinion the Court noted that "The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter" (339 U. S. at 47). "It would be an impertinence to suppose that this suggestion of the Supreme Court was made without regard to the effect of such Congressional action upon the constitutional requirements of due process." *United States ex rel. DiDente* v. *Ault*, 101 F. Supp. 496, 499 (N. D. Ohio). Moreover, the later decisions of this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 583, fn. 4, and *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33, are to the effect that the hearing examiner requirements of the APA are not an essential element of procedural due process, but may be withheld in certain areas by the Congress or waived by the parties. Indeed, Mr. Justice Frankfurter, dissenting in *Tucker*, apparently took for granted the power of Congress, following the *Sung* decision, to exempt deportation proceedings from the APA. 344 U. S. at 40.

Following the enactment of the provision of the Supplemental Appropriation Act, 1951 (*supra*, p. 17), which abrogated the *Sung* decision, and while that provision was in effect,[7] petitioner's present argument that due process of law requires compliance with the detailed provisions of the APA was repeatedly urged and uniformly re-

[7] It was repealed by Section 403 (a) (47) of the 1952 Act.

jected by the courts. *Belizaro* v. *Zimmerman,* 200 F. 2d 282 (C. A. 3); *Barber* v. *Yamish,* 196 F. 2d 53, 54, fn. 1 (C. A. 9), certiorari denied, 344 U. S. 817; *McGrath* v. *Potash,* 199 F. 2d 166 (C. A. D. C.); *United States ex rel. Lombardo* v. *Bramblett,* 114 F. Supp. 183 (N. D. Ohio), affirmed, 212 F. 2d 791 (C. A. 6), *Sigurdson* v. *Landon,* 215 F. 2d 791 (C. A. 9), certiorari denied, 348 U. S. 916; *United States ex rel. DiDente* v. *Ault,* 101 F. Supp. 496 (N. D. Ohio); see *United States ex rel. Dolenz* v. *Shaughnessy,* 200 F. 2d 288, 290 (C. A. 2), certiorari denied, 345 U. S. 928.

Turning to Section 5 (c) of the APA, we find that its separation of functions requirements are not applicable to many Federal regulatory proceedings. Thus, Section 2 (a) of the APA exempts selective service functions from all of the procedural provisions of the Act. See *United States* v. *Nugent,* 346 U. S. 1. More important, Section 5 (c) does not apply to rule-making proceedings (as defined in Section 2 (c)) or in determining applications for initial licenses—exceptions which include a large part of the formal proceedings of such agencies as the Civil Aeronautics Board, Interstate Commerce Commission, Federal Power Commission, and Federal Communications Commission.

Moreover, in the 1947 amendments to the National Labor Relations Act and in the 1952 amendments to the Communications Act, Congress has prescribed for the National Labor

Relations Board and the Federal Communications Commission stronger separation of functions requirements than are contained in Section 5 (c). Almost simultaneously, in Section 242 (b) of the Immigration and Nationality Act, Congress expressly prescribed for deportation proceedings requirements less strict than those of Section 5 (c). Thus, Section 5 (c) does not constitute *the* "currently prevailing standards of impartiality," but is only one of several standards which Congress has used since enactment of the APA in 1946. As this Court noted in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644, the APA "created safeguards even narrower than the constitutional ones."

The power of Congress to shape administrative procedures to fit particular situations is beyond question. In *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 275–276, this Court reiterated that "due process of law has never been a term of fixed and invariable content," and pointed out that the Constitution "has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, * * *". In the same opinion, the Court recognized "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." Indeed, where Congress has been less explicit than it has been here in prescribing administrative procedures, this Court has not hesitated

to construe a statutory requirement of a "hearing" in the light of the practical and policy demands of a particular regulatory problem. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *United States* v. *Nugent,* 346 U. S. 1.

Thus, it is clear that Section 5 (c) of the APA does not constitute an exclusive prevailing standard of "impartiality," and that Congress, rather than being obliged to create and adhere to such a standard, has broad power to prescribe different procedures for varied administrative tasks. No more is necessary to sustain the validity, under the due process clause, of the deliberate departure in Sections 101 (b) (4) and 242 (b) of the 1952 Act from the standards of Section 5 (c) of the APA.

However, it should be pointed out that considerations peculiar to deportation proceedings provide a rational justification for the Congressional choice of procedure. As noted above, the sole or principal issue in most deportation cases is whether the alien shall be granted some form of discretionary relief. Since such relief as the suspension of deportation sought by the alien in this case (and in *Shaughnessy* v. *Accardi*) is a matter of legislative grace, akin to a pardon, the Constitution probably does not require that an alien be accorded any kind of hearing on his application for such relief. Moreover, the determination of such discretionary matters involves considerations of policy for which the Congress

presumably desires to hold the Attorney General fully responsible. Thus, it is unlikely that Congress would be willing to accord to special inquiry officers or any other hearing officers a larger and more independent role (cf. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496) in determining applications for discretionary relief, particularly since it has reserved to itself a veto power over the administrative grant of suspension of deportation under Section 244 of the 1952 Act.

In short, there is no basis for petitioner's contention that Congress is without power under the Constitution to except deportation proceedings from the requirements of Section 5 (c) of the APA.

### III. SECTION 241 (a) (11) AND (d) OF THE IMMIGRATION AND NATIONALITY ACT DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION

Petitioner contends that his deportation pursuant to Section 241 (a) (11) and (d) of the 1952 Act constitutes a retroactive imposition of punishment in violation of the *ex post facto* clause of Article I, Section 9, of the Constitution (Pet. Br. 40–56). We contend, to the contrary, that, as repeatedly and recently decided by this Court, the prohibition of the *ex post facto* clause does not apply to deportation.[8]

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[8] While petitioner suggests in his brief (Pet. Br., pp. 41–42) that it is doubtful whether Section 241, when read in the light of the savings clause of Section 405 (a) (Pet. Br. 61–62), can be applied retroactively to effect his deportation,

The deportation order against petitioner is based entirely on the admitted fact (R. 4) that in 1938 he was convicted and sentenced for unlawfully transferring marihuana, in violation of the Marihuana Tax Act of August 2, 1937, 26 U. S. C. [1952 ed.] 2591. At that time, such conviction and sentence did not render petitioner deportable. The crime was not regarded as one involving moral turpitude within the meaning of Section 19 of the Immigration Act of 1917, 8 U. S. C. [1946 ed.] 155, *United States ex rel. Andreacchi* v. *Curran*, 38 F. 2d 498 (S. D. N. Y.);[8] and the Act of February 18, 1931, 8 U. S. C. [1946 ed.] 156a, which prescribed deportation for aliens convicted of trafficking in certain specified narcotics, did not then include marihuana among the drugs enumerated. Marihuana was added to the list by Section 21 of the Alien Registration Act of 1940, 54 Stat. 673, but Section 22 of that Act gave the addition only prospective application. Consequently, until the 1952 Act went into effect, petitioner was not deportable by reason of his 1938 narcotics conviction.

Section 241 (a) (11) of the 1952 Act (Pet. Br. 57) requires the deportation of any alien "who at any time has been convicted of a violation of

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this contention is not properly before the Court, since it was presented only in his supplemental petition for certiorari which was denied. 348 U. S. 805. In any event, even if the saving clause of Section 405 (a) would otherwise be applicable, Section 241 (d) clearly carves out an exception to it. See Brief for the Respondent, *Pino* v. *Landon*, No. 333, this Term, pp. 42–47.

[8] A contrary view has recently been expressed in *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759 (C. A. 8).

any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing * * * of * * * marihuana." Section 241 (d) (Pet. Br. 58) makes it clear that the quoted portion of Section 241 (a) (11) is applicable not only prospectively but also to aliens like petitioner whose convictions occurred prior to the enactment of the 1952 Act. See Brief for the Respondent, *Pino* v. *Landon*, No. 333, this Term, pp. 42–47.

Petitioner's entire *ex post facto* argument has been rejected by this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–595, and *Galvan* v. *Press*, 347 U. S. 522, 530–531, reiterating earlier decisions that the deportation process is a civil proceeding, that deportation is not a punishment, and that the *ex post facto* clause has no application to deportation. *Bugajewitz* v. *Adams*, 228 U. S. 585; *Mahler* v. *Eby*, 264 U. S. 32.

We would only add that petitioner's complaint that, when he was convicted in 1938 of transferring 380 ounces of marihuana, he was not forewarned that such transactions might characterize him as an undesirable alien for the purpose of deportation (Pet. Br. 42) is singularly unappealing.

## CONCLUSION

It is therefore respectfully submitted that the judgment below should be affirmed.

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WARREN OLNEY III,
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MARCH 1955.

## APPENDIX A

8 C. F. R. 242.53 provides as follows:

§ 242.53. *Conduct of hearing*—(a) *Special inquiry officer; general powers.* The special inquiry officer assigned to conduct the hearing under this part shall have authority to:

(1) Administer oaths and affirmations;

(2) Issue, during the course of a hearing, any subpenas authorized by law;

(3) Conduct the hearing, present and receive evidence, and rule upon all objections to the introduction of evidence or motions made during the course of the hearing;

(4) Take or cause depositions to be taken;

(5) Make decisions in accordance with § 242.61 or § 242.76; and

(6) Take any further action consistent with applicable provisions of law and regulation.

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of such objections. If the testimony is transcribed, the special inquiry officer shall certify that to the best of his knowledge and belief the transcript is a true and correct report of everything that was stated during the course of

the hearing, including oaths administered and rulings on objections, but excluding statements made off the record.

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall (1) place the respondent under oath or affirmation, (2) advise the respondent of his right to representation, at no expense to the Government, by counsel authorized to practice in such proceedings, as he shall choose, and require him to state then and there for the record whether he desires such representation, (3) enter of record a copy of the warrant of arrest and a copy of Form I–226 when such form contains charges in addition to those contained in the warrant of arrest, and explain to the respondent in simple, understandable language the nature of the charges contained in the warrant of arrest and the additional charges contained in Form I–226, (4) advise the respondent that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government, and (5) present the evidence, including the interrogation, examination, and cross-examination of the respondent and witnesses to the extent necessary, as to (i) alienage, (ii) date, place and manner of entry of the respondent into the United States, (iii) grounds for deportation, (iv) factors bearing upon the respondent's eligibility for discretionary relief if application therefor has been made, and (v) such other matter as may be pertinent to the issues in the case. Except in the case of an alien prima facie deportable under section 242 (f) of the Immigration and Nationality Act, the special inquiry officer, in such cases

and at such time during the hearing as he deems appropriate, may advise the respondent concerning application for the privilege of suspension of deportation or voluntary departure under the provisions of section 244 of the said Act, and shall further advise the respondent of his right to specify the country to which his deportation is to be directed in the event such deportation is required by law and request the respondent to specify such country for the record.

(d) *Special inquiry officers; additional charges.* If it appears during the hearing that the responent may be deportable on charges other than or in addition to those contained in the warrant of arrest or in the notice of hearing, the special inquiry officer, except as provided in § 242.75, may lodge additional charges against the respondent and shall develop evidence upon such charges in like manner as on the charges contained in the warrant of arrest or notice of hearing. When additional charges are lodged, the special inquiry officer shall explain these charges to the respondent in simple, understandable language and shall advise him, if he is not represented by an attorney or other qualified representative, that he may be so represented if he desires, and require him to state then and there for the record whether he desires such representation. The special inquiry officer shall also inform the respondent that he may have a reasonable period of time within which to meet the additional charges, if he desires, and require him to state then and there whether he desires such additional time.

(e) *Withdrawal and substitution of special inquiry officer.* The special inquiry officer assigned to conduct the hearing may at any time withdraw

if he deems himself disqualified. If a special inquiry officer becomes unavailable to complete his duties within a reasonable time, another special inquiry officer shall be assigned to complete the case. In such event, the new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so.

(f) *Assignment of examining officer in addition to special inquiry officer; duties of examining officer.* Prior to the commencement of a hearing, or during the course of a hearing upon the request of the special inquiry officer presiding at such hearing, the district director or the officer in charge having administrative jurisdiction over the place where the proceedings are pending, in his discretion, may assign an immigration officer to act at the hearing as the examining officer. The examining officer shall in such case conduct any required interrogation of the respondent and of the witnesses in behalf of the Government, examine or cross-examine the respondent's witnesses and present evidence bearing upon the question whether the respondent is subject to deportation. Except as provided in §§ 242.74 and 242.75, he shall lodge such additional charges as he may find to be applicable and, if the respondent has applied for relief from deportation, inquire thoroughly into the respondent's eligibility for the relief requested, and develop such other information as may be pertinent to the proper disposition of the case. The assignment of an examining officer shall not impair the authority conferred by the Immigration and Nationality Act or this chapter upon the special inquiry officer presiding at such hearing.

(g) *Representation by counsel.* If the respondent is represented at the hearing by an attorney or other qualified representative, the attorney or representative shall be permitted to be present during the entire hearing, to introduce evidence in behalf of the respondent and to cross-examine witnesses. The attorney or representative shall be permitted to state his objections succinctly, and they shall be entered on the record. If representation is waived, the respondent shall be permitted to introduce evidence in his own behalf, to cross-examine witnesses, and to make objections which shall be entered on the record.

(h) *Interpreters.* If the services of an interpreter are found necessary in the conduct of a hearing, the special inquiry officer, if qualified, may act as interpreter with the consent of the respondent, or he may request the district director or the officer in charge having administrative jurisdiction of the office in which the proceedings are pending to furnish an interpreter, who shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the Service, in which event, no such oath shall be required.

(i) *Postponement and adjournment of hearings.* Prior to the commencement of a hearing, the district director or the officer in charge having administrative jurisdiction of the office wherein the case is pending, may grant a reasonable postponement for good cause shown, at his own instance upon notice to the respondent, or upon request of the respondent. After the commencement of the hearing, the special inquiry officer presiding at the hearing may grant a reasonable adjournment for good cause shown, at his own instance upon notice to the respondent or

upon request of the respondent. A continuance of the hearing for the purpose of allowing the alien to obtain representation, shall not be granted more than once, unless sufficient cause for the granting of more time is shown. The file or the record of hearing shall reflect the action taken with respect to any postponement or adjournment of hearing. Exceptions to a ruling on a request for a postponement or an adjournment of hearing may be taken by the respondent and, if taken, shall be noted on the record.

(j) *Consolidation.* Whenever two or more cases pending in the same district involve common questions of law or fact, the district director or the officer in charge having administrative jurisdiction of the office wherein the cases are pending, may order a joint hearing of any or all matters and issues common to the cases, he may order all such hearings consolidated, and may make such further orders as may tend to avoid unnecessary cost and delay.

# APPENDIX B

[For release on delivery, October 2, 1952]

## DEPARTMENT OF JUSTICE

Attorney General James P. McGranery today made the following statement:

I am happy to see you again and to have the opportunity to discuss with you the program of the Department.

My main purpose in inviting you today is to explain to you a program which has been formulated to answer a departmental need which I have recognized for some years. You already have glimpsed part of our purpose—but our ultimate goal has never been clearly stated.

Our final goal—which we approach with vigorous determination is to restore the dignity of citizenship and to realize the promise of a full life in accordance with American ideals for those who come to us from foreign lands.

In order to achieve this positive end it is necessary to thwart the criminal activities as pursued by those ungrateful recipients of American hospitality—the naturalized racketeers—who insult the Flag and the Nation by flagrant disrespect and disobedience to the laws of the land which has given them refuge and freedom. Hence there will be a series of individual petitions to the District Courts to revoke naturalization. We will pursue a similar course with respect to Communists who have reached their status as citizens through naturalization.

In addition, appropriate action for deportation will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense. We will do our job with thoroughness so that we can be certain that every bit of evidence necessary to successful prosecution will be properly presented.

I may digress here to say that—it is and has been my earnest and considered opinion—the execution of this plan will do much to destroy the roots of organized crime in America.

There will, of course, be no relaxation in our continuing program of deporting Communist aliens.

We already have told you that we are moving for the denaturalization of Frank Costello. You also have been told of our order that Charles Chaplin be held for hearing when he seeks to reenter this country. He will be required to show, as does every alien seeking original entry, that he is admissible under our immigration laws.

This should be a salutary lesson for the youth of our land who are striving to determine for themselves what it means to be a citizen. It will give a new meaning to citizenship in that those who seek it, owe it to the nation to live good lives and contribute to its welfare.

# APPENDIX C

[For immediate release Tuesday, December 30, 1952]

## Department of Justice

Attorney General James P. McGranery announced today that Carlos Marcello of Miami, Florida, and Jefferson Parish, Louisiana, has been arrested on a deportation warrant by the Immigration and Naturalization Service.

The arrest in New Orleans was the first major deportation move undertaken since the new Immigration and Nationality Act became effective December 24, 1952. The action was another step in the Attorney General's program of denaturalization and/or deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities.

Marcello, born February 6, 1910, in Tunis, Africa, entered the United States for permanent residence October 7, 1910, at New Orleans.

He allegedly is engaged in large scale slot machine operations and other gambling activities in Louisiana.

The deportation warrant was based on his conviction in 1938 for violation of the Marijuana Act. Such a conviction is a deportable offense under the new Immigration and Nationality Act.

The action follows lengthy investigations by both the Federal Bureau of Investigation and the Immigration and Naturalization Service. His conviction under the Marijuana Act was one of only two in his checkered career. The other

case in which he was convicted was under Louisiana State law, the conviction being for assault and robbery, and on May 13, 1930, he was sentenced to serve a term of 9 to 14 years in the Louisiana State Penitentiary. The Governor of Louisiana gave him a full pardon for this crime July 16, 1935.

Marcello served a year and a day after his conviction under the Marijuana Act.